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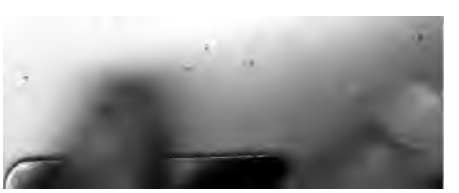

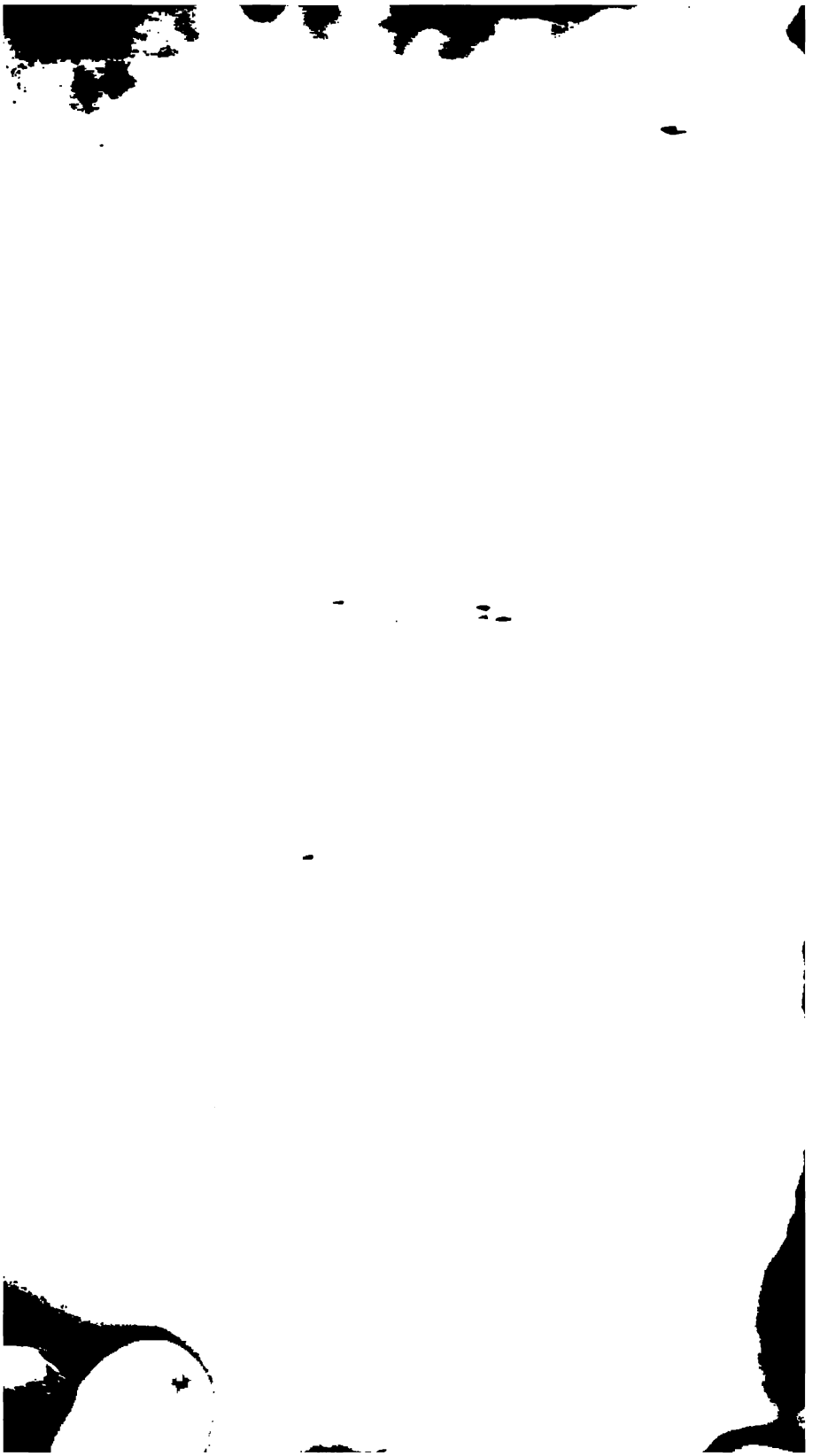

NEW REPORTS

OF

CASES

ARGUED AND DETERMINED,

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM EASTER TERM, 44 GEO. III. 1804,

TO TRINITY TERM, 45 GEO. III. 1805,

BOTH INCLUSIVE,

With Tables of the Cases and Principal Matters.

By JOHN BERNARD BOSANQUET,

OF LINCOLN'S INN, Esq. BARRISTER AT LAW,

AND CHRISTOPHER PULLER,

OF THE INNER TEMPLE, Esq. BARRISTER AT LAW.

Ut non difficile sit, quæcunque nova causa, consultatiove acciderit, ejus tenere jus.

CIC. DE LEG.

VOL. I.

LONDON:

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1806.

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THE Reporters, in compliance with a wish very generally expressed by the Profession, have published the following reports in Octavo, in which form this Work will in future appear. To prevent confusion in citation, they have given to this Publication the Title of NEW REPORTS.

DURING the Spring Circuit, at his House in *Great George-Street, Westminster*, died the Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Justice of the Court of Common Pleas.

Early in *Easter* Term JAMES MANSFIELD Esquire, one of His Majesty's Counsel, was appointed Lord Chief Justice, and knighted.

On being called to the degree of Serjeant at Law he gave Rings with this Motto:

Serus in cœlum redeas.

A

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CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Forty-fourth Year of the Reign of GEORGE III.

The KING *v.* ROBERT ASLETT.

Feb. 16th.

Exchequer bills, purchased by the Bank for a good consideration, but signed in the name of the auditor of the Exchequer by a person not legally authorised, are securities, or at least effects within the meaning of the 15 *Geo.* 2. *c.* 13. *s.* 12.; and if a servant of the Bank embezzle such bills, he may be convicted of felony under that statute.

THE prisoner was tried and convicted before Mr. Justice *Le Blanc*, at the *Old Bailey*, *September* sessions 1803, for embezzling certain papers belonging to the Governor and Company of the Bank of England, he being an officer and servant of the Bank, and as such, entrusted therewith. The first count of the indictment stated, that *Robert Aslett* was an officer and servant of the Governor and Company of the Bank of *England*, and, as such officer and servant, was entrusted by the said Governor and Company with certain *effects* belonging to the said Governor and Company; that is to say, a certain

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paper, partly printed and partly written, purporting to be a bill, commonly called an Exchequer bill; the tenor of which said paper, partly printed and partly written, is as follows; that is to say, (setting forth a bill for 500*l.* No. 835.,) which said paper was then and there belonging to the said Governor and Company, and of the value of 500*l.*; and which said sum of 500*l.* in the said paper mentioned was then and there unpaid and unsatisfied to the said Governor and Company, the holders thereof. (The indictment then set forth two other bills in like manner No. 2694 and No. 1061, each for 1000*l.*); and that the said *Robert Aslett*, so then and there being such officer and servant of the said Governor and Company, and so entrusted as aforesaid with the said effects, so as aforesaid belonging to the said Governor and Company, did then and there, with force and arms, feloniously secrete, embezzle, and run away with the said effects, so as aforesaid belonging to the said Governor and Company, and of the value of 2500*l.*, against the statute and against the peace, *&c.* There were other counts in the indictment; some like the first count, above set forth, only not stating the paper to be of any value, and others not stating any value, but stating that the Governor and Company had, on the credit and security of the paper, partly printed and partly written, advanced a large sum of money, which money was unpaid and unsatisfied to the said Governor and Company, the holders thereof. There was also a like set of counts, calling the bills securities instead of effects.

It was admitted, on the part of the prosecution, that these bills were not valid and legal Exchequer bills, having been signed with the name of Lord *Grenville*, the Auditor of the Exchequer, by a person not legally authorised to sign them for him, but that they had been issued as good and valid bills, and the Governor and Company of the Bank had bought them, and paid for them as such.

Judg-

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Judgment having been respited on an objection that the papers in question were not *effects* within the 15 *G.* 2. *c.* 13., the case was argued before the Judges in the Exchequer Chamber.

Erskine for the Prisoner. By the common law the crime of larcency was confined to chattels of intrinsic value. It was confined to chattels, because it was thought that depredations upon freehold property were less easily committed, and that it was not necessary, therefore, to repress them by a punishment so severe. From time to time, however, the law of larceny has been extended with respect to the subject matter; and various statutes have passed, by which it is made felony to take iron, brass and other metals, though fixed to the freehold, or to take fish out of fish-ponds, or to lop timber trees. But the Legislature never appears to have entertained the idea that the law of larceny had not descended low enough in respect of the value of the thing taken. Before the 2 *Geo.* 2 *c.* 25. larceny could not have been committed of a bill of exchange, Bank note, bond, or other paper security for money, because the paper taken had no intrinsic value. To remedy this defect, therefore, the statute provides that persons who steal such securities shall be guilty of larceny in the same manner as if they had taken other goods of the value secured. The Legislature considered the theft of a security as an offence equally injurious to the public as a theft of the thing secured; but it did not think it necessary to provide any remedy for thefts which respected property less insignificant than that which the common law had made the subject of larceny. The object of passing the 15 *Geo.* 2. *c.* 13. was to remedy a defect of a very different nature. Though it had been made felony by the 21 *H.* 8. *c.* 7 (which statute indeed appears to have been only declaratory of the common law) for a servant to embezzle property entrusted to him by his master, yet if the pro-

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perty were delivered to the servant by a third person for the use of the master, it was not felony in the servant to steal it. That such was the doctrine of the common law appears clearly from the cases of *Rex* v. *Waite*, 1 *Leach Cro. Cas.* 33. and *Rex* v. *Bazely*, 2 *Leach* 973. The intention of the Legislature, therefore, in passing the 15 *Geo.* 2. called the Bank act, was to put the embezzler upon a footing with the thief. The subject-matter of larceny had been sufficiently provided for by other statutes, and does not appear to have been in contemplation upon this occasion; and indeed it is not to be supposed that in providing for the security of the Bank of *England* the Legislature intended to contemplate property of inferior value to that which was the subject of larceny if taken from a private individual. Yet if the argument for the prosecution is to prevail, it must be considered a capital felony for a Bank clerk to embezzle the smallest scrap of paper, or an old pen belonging to the Bank of *England*, though to steal property of the same description from any other person would not amount to petty larceny. The 15 *Geo.* 2. *c.* 13. *s.* 12., upon which this indictment is founded, enacts, that "if any officer or servant of the Bank, being entrusted with any note, bill, dividend-warrant, bond, deed, or any security, money, or other effects belonging to the said Company," shall embezzle such note, &c. he shall be deemed guilty of felony. By the words "other effects" it is evident that the Legislature intended things of a different nature from securities; every species of security which could come into the hands of a servant of the Bank is comprehended under the words in the former part of the sentence; and as the words "other effects" immediately follow the word "money," it is most probable that bullion or other valuable articles of a similar nature were in the contemplation of the Legislature. It is the more evident that the effects here contemplated were supposed to have an intrinsic value, since the word "valuable" is expressly introduced

introduced into the 39 *Geo.* 3. *c.* 85. which was passed for the purpose of extending the benefits of the 15 *Geo.* 2. to all persons whatsoever; and as both statutes are *in pari materiâ*, they must be construed together. Indeed as the punishment inflicted by the latter act amounts only to transportation, it would be absurd to suppose that the Legislature could intend to punish with transportation only those who should be guilty of embezzling effects of intrinsic value entrusted to them by private persons, and yet to punish with death those who should embezzle effects of the Bank of so small a value as not to be the subject of criminal prosecution. As the papers in question were clearly not available in law, it is impossible to contend that they come under the description of Securities: it has indeed been decided that a person may be convicted of forging an instrument which, independent of the forgery, would be void for want of a proper stamp: but the crimes of forgery and larceny depend upon principles of a very different nature. The former consists in giving a fictitious value to that which is worth nothing, and the latter in taking from another something which already has a real value. But supposing the prisoner to have been rightly convicted, another question arises, namely, whether the 15 *Geo.* 2. *c.* 13., so far as relates to the punishment of death, has not been repealed by the 39 *Geo.* 3. *c.* 85. Though the preamble of the latter act only refers to the servants and clerks of "bankers, merchants, and others," and recites doubts whether embezzling by such clerks and servants amounted to felony, (which doubts could not exist with respect to the clerks of the Bank); yet, as the enacting part is general, it ought not to be restrained by the preamble. In the case of *Rex* v. *Marks*, 4 *East*, 157. it was held that though the preamble of the 37 *Geo.* 3. *c.* 123. was confined to the administration of unlawful oaths in order to give effect to attempts to seduce persons from their allegiance; yet, as the enacting part extended to the administering

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unlawful oaths purporting to bind the person taking the same, "not to reveal any unlawful combination or confederacy, or not to reveal any illegal act done or to be done," the administering an oath purporting to bind the person taking the same not to divulge the secrets of an unlawful association of journeymen for the purpose of raising wages, was held to be within the operation of the statute. Here the words of the 39 *Geo.* 3. are sufficiently comprehensive to include the clerks and servants of the Bank, and if the 15 *Geo.* 2. had never passed, the prisoner might certainly have been indicted under that act. Is it not reasonable then to suppose, that as the Legislature had, in the first instance, passed a severe law with respect to the servants of the Bank only, and afterwards came to the determination of passing a general law upon the same subject of a milder natnre, the old penalty with respect to the servants of the Bank was intended to be repealed, and one general, but milder law, to be applied to the whole kingdom? In the case of *Rex* v. *Davis*, 2 *Leach* 306. it was holden that the 16 *Geo.* 3. *c.* 30., which punishes killing deer in a park with a penalty of 20*l.* in the first instance, and makes the second offence felony, had repealed the Black act, 9 *Geo.* 1. *c.* 22., so far as it made that offence felony without benefit of clergy in the first instance.

Giles for the prosecution. With respect to the supposed repeal of the capital punishment presribed by the 15 *Geo.* 2. it may be observed that the 39 *Geo.* 3. relates to a different species of offences from those mentioned in the 15 *Geo.* 2.; for by the preamble of the 39 *Geo.* 3. it plainly appears that the offences within the scope of that act are offences with respect to which doubts had been entertained whether they amounted to felony before that act, whereas no doubt could arise whether the offences comprehended in the 15 *Geo.* 2. amounted to felony, since they are expressly made felony by that act. Moreover the

the denominations of property contained in the two statutes are different. The former speaks of deeds and dividend-warrants, which are omitted in the latter; and in the latter statute the word "valuable" is introduced, which is not to be found in the former. The latter act extends to *Scotland*, but the former does not. The subject-matter therefore of the two acts being different, there is no ground to infer that the penalty contained in the one was intended to be altered by the other. It is true that the penalty imposed by the 9 *Geo.* 1. *c.* 22. on deer-stealers was holden to be repealed by the 16 *Geo.* 3. *c.* 30. though the former statute was not particularly mentioned, but the preamble of the latter statute having recited the intention of the Legislature to repeal all such laws respecting deer-stealers as were ineffectual, and to reduce all the good provisions into one act, it was not to be supposed that the penalty contained in the 16 *Geo.* 3. could be intended to remain in force. Here both statutes may stand together without inconsistency, and where that is the case a repeal is not to be presumed. This was expressly laid down in *Robinson's* case, *East P. C.* 1110, *Leach Cro. Cas.* 869. [Lord *Ellenborough* Ch. J *Leges posteriores priores contrarias abrogant.* All the cases are but applications of this principle.] Secondly, the papers described in the indictment must be deemed effects, within the meaning of the 15 *Geo.* 2. They were the property of the Bank: and though not legally available as securities, they were papers which it was of the highest importance to the Bank to preserve. On giving up these papers the Bank would have been entitled to an action for money had and received against those from whom they received them. They were therefore of importance as affording evidence upon which such an action might be founded. The words of the statute do not confine its operation to effects of any particular quality or value: and the word "effects" itself is the largest denomination of personal pro-

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perty that can be used. It is urged however that the effects intended by this statute must be effects of which larceny could be committed. But it is to be observed that the 15 *Geo.* 3. does not make the embezzlement of the property there described larceny, but creates a new felony, wholly independent of larceny, either at common law or by statute. The statute of the 39 *Geo.* 3. does indeed make the embezzlement thereby referred to larceny, for it enacts that all persons who shall embezzle the property therein described shall be deemed to have feloniously stolen the same. It is therefore to be expected that the word "valuable" should be added to the description of the property which is the subject of that act; for unless the property were of value, either in itself or as a security, a person taking such property would not be guilty of stealing. It appears however to have been the object of the Legislature to protect the corporation of the Bank against the embezzlement of all property whatsoever. Among the descriptions of property in the 15 *Geo.* 2. the word "deeds" is to be found, which is omitted in the 39 *Geo.* 3. Now it is clear that the stealing a power of attorney, which is a deed, would not be larceny. The words, "dividend-warrants" is also inserted in the 15 *Geo.* 2. but omitted in the 39 *Geo.* 3. This difference as well as the insertion of the word "valuable" in the latter act, when it was omitted in the former, very plainly shews that the objects of the Legislature in passing the two acts were not the same. It may often be of importance to the Bank to preserve books and papers of no intrinsic value. A single sheet of paper may contain accounts of more consequence to the Bank than securities to a large amount. With respect to the supposed absurdity of making it a capital felony to take a piece of paper or an old pen, it may be answered that the crime can never be established unless a felonious intent be found.

On

1804.

The KING v. ASLETT.

On this day the opinion of the Judges was delivered at the *Old Bailey* by

Lord ALVANLEY Ch. J. who (after stating the case) said, It was admitted on the part of the prosecution that the bills which are the subject of this indictment, were not valid and legal Exchequer bills, having been signed with the name of Lord *Grenville*, the auditor of the Exchequer, by a person not legally authorized to sign them for him; but it appeared that they had been issued as good and valid bills, and that the Governor and Company of the Bank of *England*, had bought them and paid for them as such. Upon the indictment the prisoner was convicted, but judgment was respited in order that the opinion of the Judges might be taken whether these bills or papers were *effects* or *securities* within the 15 *Geo.* 2. *c.* 13. *s.* 12. Eleven of the twelve Judges met in the Exchequer Chamber on the objections which were taken by the counsel for the prisoner at the time of his trial. Much consideration was given to those objections: they were very fully and very ably argued by counsel. The Judges have since held different conferences upon them, and it is now my duty to communicate the result of their mature deliberation. Two points were made in the prisoner's favour, one (which I mention first in order to lay it out of the case), was, that supposing the offence with which the prisoner stood charged to be of such a description as to fall within the act of 15 *Geo.* 2. *c.* 13. *s.* 12., yet that he could not be convicted under it, because that statute has been repealed by the subsequent act of 39 *Geo.* 3. On that point, which at the time it was made was not deemed by the counsel as the great and principal objection, it is unnecessary for me to enlarge, because all the Judges are clearly of opinion that on that point no doubt can be entertained, and I am authorized by them to say, that they all concur in the decision that nothing is contained in the second

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second act which can operate as a repeal of the first. The more important question was, Whether on the true construction of the 15 *Geo.* 2. the bills or papers stated do in point of law fall within the words "effects or securities" meant to be described in the act of parliament? On this point the Judges have not been unanimous, but a majority of them are of opinion that they are effects or securities within the true meaning of the act. That clause runs thus: "Be it further enacted by the authority aforesaid, that if any officer or servant of the said Company, being entrusted with any note, bill, dividend-warrant, bond, deed, or any security, money or other effects belonging to the said Company, or having any bill, dividend-warrant, bond, deed, or any security or effects of any other person or persons lodged or deposited with the said Company, or with him as an officer or servant of the said Company, shall secrete, embezzle, or run away with any such note, bill, dividend-warrant, bond, deed, security, money, or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony and shall suffer death as a felon, without benefit of clergy." The great object of the Legislature was to add security and protection to the Bank; its immense national concern called upon the Legislature for particular provisions. The principles of legislation must be applied to the subjects then under consideration, and the view to be taken of any code of laws, or any particular law, must be more comprehensive when it embraces so vast a concern as the Bank of *England*, than when it is applicable to personal regulations respecting private individuals. Considering this law then in the large and liberal view with which it was framed by the Legislature, the Judges at the same time disclaim any idea of straining any part of it beyond its plain and natural bearing, more especially in a case in which the violation of it is so penal. The recollection of the enormous weight

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of Exchequer bills in circulation, and how deeply the Bank is concerned in them, cannot but occur to every mind. In the present case the Bank had bought and paid for the bills in question, they had become the fair and honest property of the Bank for a valuable consideration; this is allowed on all hands, but still it was argued that they are not such effects or securities as fall within the true construction and meaning of the act of parliament, because though they are unquestionably of a certain, they are not of any positive intrinsic value. Now whatever the Bank have of their own, or whatever should be deposited with them as bankers by any body else, was expressly protected from the embezzlement of their officers or servants by the words of the act; and though the bills in question may not on the face of them be of any descriptive legal value, yet they carry about them such a consequence at least as may make their preservation of *infinite* importance to the Bank. In that view therefore they have a value. But there is another answer that appears indeed decisive, though they may not be in strictness of expression, from the defects stated in their signature, the very Exchequer bills they would be were that defect removed, yet the government of the country is notwithstanding pledged to pay them even as they are. They have been issued under the authority of parliament, they were given as valid bills, and the holders of them have as strong a claim, I will not say on the honour only, but on the justice of government for payment, as if they were technically correct in all their parts; they are therefore valuable papers at least, whatever they may be called. The holders of them received them as such, they were issued to them as having the stamp of property up to the value which they import to bear. They are therefore, in the true meaning of the word, securities which may be rendered available to any persons having the legal right to them. Nor are they less to be deemed effects. The word

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word "effects" is a very large and general term, and is confined to no particular description of property, either in specie or value; it was therefore probably inserted in the act studiously, when the Legislature were placing a special guard round the Bank. Be they effects or securities, or both, they import value on the face of them. It should be observed too, that the offence of embezzling them is not made larceny, where some value must attach on the thing taken; but it is created a felony, which induces no necessity for any value being ascertained, but the bills themselves are such a species of securities or effects as no man would hesitate to give the value for which they import to bear. If a bankrupt were in possession of them they are such effects as he would be bound to deliver up to his creditors, and if an insolvent debtor were to retain them as not being effects, without inserting them in his schedule, the common sense of mankind would revolt at the idea. An executor who found such bills in the possession of his testator would be bound to pay the tax upon them, as making part of the personal estate coming to his hands, and he would be liable to a *devastavit* if he destroyed them. In short, many cases might be put to prove them effects. But it was argued, that if the word "effects" was to be so largely construed, without any restriction, that would lead to the absurdity of descending to things so trifling as it would be perfectly ridiculous to state, such as the stumps of a few old pens, or a piece of blotting paper in the office. But the Judges have not found themselves driven to that extreme length. Their judgment only determines that the words of the act necessarily extend to such securities or effects as are entrusted to their officers or servants, and that the bills in question fall under that description. Their only technical defect therefore being of such a nature as government would if necessary, be bound instantly to correct and rectify, and the bills in question being the fair property of the

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the Bank, who had purchased them *bona fide* for a valuable consideration, the majority of the Judges are of opinion that they are effects or securities falling within the true construction of the 15 *Geo.* 2., and that their embezzlement by the prisoner under the circumstances of this case, being an officer and servant of the Bank, subjects the prisoner in point of law to conviction upon the indictment of which he was found guilty.

WOODMESTON *v.* SCOTT.

April 30.

Defendant having given a bond, conditioned for the payment of a sum of money if a sentence of a Vice Admiralty Court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, Defendant was arrested and holden to bail; the appeal being restored upon petition, the action was suspended and the bail discharged; but being again dismissed, a new action on the bond was commenced, and the Defendant was again arrested and holden to bail. From this second arrest the Defendant applied to be discharged; but the Court rejected the application.

THIS was an application to discharge the Defendant upon a common appearance, under the following circumstances. The Defendant in 1791 was arrested for 3035*l.* due upon a bond, dated the 1st of *April* 1776, conditioned for the payment of the sum of money therein mentioned, in case the sentence of the Vice-Admiralty Court of *Antigua*, on the appeal of one *S. M.* should be affirmed; the appeal was dismissed for want of prosecution, whereupon the above arrest took place, and bail above were put in and perfected; in the same year the appeal of *S. M.* was upon petition restored, and in consequence thereof the proceedings in the former action were suspended, the Plaintiff never declared, and the bail were discharged; *S. M.* not having proceeded in his appeal so restored, the same was dismissed in *March* last, upon which the Defendant was again arrested and holden to bail in this action; the Defendant became a bankrupt and obtained his certificate in the year 1795.

Shepherd, Serjt. in support of the rule, contended that the second arrest was in fact for the same cause of action as the first, and that as the Plaintiff had commenced his first action too soon he ought to suffer for such his conduct. He referred to *Taylor* v. *Wasteness*, 2 *Str.* 1218. and *Turner*

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Turner v. *Schomberg*, *ibid.* 1233. and *Imlay* v. *Ellefsen*, 4 *East*, 309.

Marshall, Serjt. *contrà*, observed that the first action was not improperly commenced, as had been supposed, the appeal having been dismissed at the time when that action was commenced, and that it was the conduct of the Defendant himself, in reviving the appeal, that rendered the second action necessary.

Sir JAMES MANSFIELD Ch. J. There seems to me to be no ground for this application. The first action was not brought too soon, for at the time of its commencement there was a good cause of action. That being so, the appeal was revived by an order of council, and of course the action could not be proceeded in: after this the appeal was again dismissed, and the Plaintiff was again enabled to commence an action. Why should he not be entitled to bring this action with all the advantages that he possessed before; one of which is the power of holding the defendant to bail?

HEATH and ROOKE Js. concurring,

Rule discharged.

May 5th.

WILLES and Others *v.* GLOVER.

THIS was an action on a policy of insurance on a cargo of goods on board the ship *Wolfgarth* from *Berderygge* to *London*. At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* sittings after last *Hilary* term, it

Action on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th December, without communicating a letter received by them the day before, but dated the 30th *November*, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible; held a material concealment, though the ship did not in fact sail until the 24th *December*.

appeared

appeared that the shippers on the 30th of *November*, 1802, wrote to the Plaintiffs, who were the consignees, in these words: "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can, for my account." This letter having been received by the Plaintiffs on the 13th of *December*, they effected a policy on the next day, without communicating the letter to the underwriters. It was also proved that it was not the custom for ships to sail from *Berderygge* to *London* without a fair wind; that the voyage was often performed in four or five days, and when the weather was not very favourable, in about ten days. The ship *Wolfgarth* did not in fact sail till the 24th of *December*. The jury found a verdict for the Plaintiffs.

On a former day *Shepherd* Serjt. having obtained a rule *nisi* for a new trial.

Bayley Serjt. now shewed cause, and contended that as the ship did not sail until ten days after the policy was effected, the risk was in no respect varied by the concealment of the letter; that unless the circumstance concealed would vary the amount of the premium, the concealment will not vitiate the policy; that the expectation of the shipper in this case, which was not realized by the sailing of the ship at the expected time was not material, and therefore need not be communicated to the underwriters. He observed that this case differed essentially from those of *Da Costa* v. *Scanderet*, 2 *P. Wms.* 170, *Seaman* v. *Fonnereau*, 2 *Str.* 1183. *Hodgson*, v. *Richardson*, 1 *Bl.* 463. and *Ratcliffe* v. *Shoolbred*, *Park's Insur.* 181.; in all which cases the circumstances concealed would have materially varied the premium, had they been disclosed to the underwriters.

Sir JAMES MANSFIELD Ch. J. (stopping *Shepherd* and *Best* Serjts. in support of the rule). I have great difficulty

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culty in conceiving how the omission to communicate the letter in question to the underwriters can be deemed immaterial. When the shipper says that he expects the captain to sail to-morrow, it imports that he who writes knows the ship to be in such a condition as to give a just expectation of her sailing at that time; he then desires the consignee, in case the ship should not have arrived, to effect the insurance as low as possible. By this he seems to have supposed that the ship might arrive before the letter, and that if it did not a high premium would be exacted. Was not this letter therefore material to be communicated to the underwriters, in order that they might have an opportunity of exercising their judgment in settling the premium? Had it not been for the opinion of the jury, I should not have entertained the least doubt upon the subject. But though great respect is due to their opinion, still I think their judgment has been too hastily formed, and that the case ought to be reconsidered.

HEATH and ROOKE Js. concurring,

Rule absolute *(a)*.

(a) The cause was tried again, and a verdict found for the Defendant.

May 5th.

STRONG *v.* NATALLY.

Action on a policy on goods "until the cargo should be discharged and safely landed;" on the arrival of the ship the goods insured were put on board a lighter hired in the usual way and brought to the Plaintiff's wharf in the evening, but not landed, on account of the rough weather; the Plaintiff then undertook to see to the landing himself, but in the night the lighter was by an unavoidable accident, sunk, and the goods lost: held that the underwriters were discharged.

THIS was an action on a policy of insurance on a cargo of fish from *Shetland* to *London*. The policy was in the usual form "until the cargo should be discharged and safely landed." The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* sittings after last *Hilary* term, when the jury found a verdict for the Defendant under the following circumstances. On the ar-

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rival of the ship the goods insured were put on board a lighter hired in the usual way, and brought to a wharf belonging to the Plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening. The lighterman finding that he could not land the goods, asked the Plaintiff whether he should stay to see the cargo landed. The Plaintiff said that he need not do so, for that he (the Plaintiff) would look to the landing himself. Accordingly the lighterman left the cargo alongside the wharf. In the course of the night the lighter was sunk, without any neglect being imputable to any one, and a watchman in the employment of the plaintiff having discovered the circumstance, immediately gave an alarm.

A rule having been obtained on a former day, calling on the Defendant to shew cause why the verdict should not be set aside and a new trial had,

Shepherd Serjt. now shewed cause, and insisted that the liability of the Defendant was put an end to by the conduct of the Plaintiff in taking the goods under his own care; that if such a delivery were not sufficient to discharge the underwriters nothing short of the goods being actually warehoused would relieve them from their undertaking. He admitted the authority of *Hurry* v. *The Royal Exchange Assurance Company*, 2 *Bos. & Pul.* 430. but insisted that this case was distinguishable from that, since there the only question was, Whether the insurer was liable for the risk attending the carriage of the goods from ship to shore in a public lighter, whereas here, admitting the underwriter to be subject to such liability, the goods were received by the Plaintiff into his own custody, insomuch that the lighterman was prevented by him from taking that care of them which he would otherwise have done.

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Best, Serjt. *contra*, observed that the only question was, Whether the voyage was at an end, for if not, the loss had happened by one of the perils insured against; that in *Hurry* v. *The Royal Exchange Assurance Company*, the authority of *Sparrow* v. *Carruthers*, 2 *Str.* 1236. had been considerably shaken, in which latter case it had been holden that a party by taking goods into his own lighter discharged the underwriters; that the conduct of the Plaintiff in this case could not amount to more than making the lighter his own; that it was of no consequence whether the goods during the night remained in the custody of the lighterman or of the Plaintiff, since neither of them could have prevented the accident which happened; that the goods therefore being lost in the course of their conveyance from the ship to the shore, the underwriter, according to the authority of *Hurry*, v. *The Royal Exchange Assurance Company*, was liable to answer for the loss.

Sir JAMES MANSFIELD Ch. J. This case depends upon a very short point; namely, whether the owner of the cargo, under the particular circumstances of this case, did not take the cargo into his own care and possession? It seems to me that he did. The goods were brought in the lighter to the Plaintiff's wharf, and if nothing had happened to relieve the lighterman from that duty, he would have been bound to set some person to watch over the goods until they should be landed. But the owner of the goods in this case dispensed with the obligation of the lighterman to take charge of them during the night, and took them into his own custody; and while they were in his custody they were lost. Can it be contended then that by such conduct the Plaintiff did not discharge the lighterman? If he did discharge the lighterman he placed himself in the same situation as if the goods had been actually landed and delivered. It is argued that it does not appear that any care could have prevented

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prevented the accident which happened; as to which I will only observe that neither does it appear that the accident might not have been prevented by extraordinary diligence. It appears to me that this case is not distinguishable from that of *Sparrow* v. *Carruthers*. There the owner of the goods chose to employ his own private lighter to land them, and by that act he was holden to have discharged the underwriter. The Plaintiff in this case chose to take the goods into his own possession before they were landed, and having so done he might have kept them in the lighter for a week, for he had as much control over them, as if they had been in his custody for that period. I think the verdict therefore perfectly right.

HEATH J. I am of the same opinion. The Plaintiff in this case relies on the words in the policy "until they are safely landed." But every party may renounce so much of a contract as is for his own benefit. Now in this case the Plaintiff by his conduct has renounced all the benefit which would have accrued to him from the words of the policy on which he relies. It matters not how the loss happened after the Plaintiff had released the underwriters from that provision in the policy under which they would otherwise have been liable.

ROOKE J. I am of the same opinion, and I should not add any thing to what has already been observed by my Lord Chief Justice and my brother, with whom I entirely agree, if it had not been supposed by Mr. *Park* in the last edition of his book, p. 22., that this Court, in the case of *Hurry* v. *The Royal Exchange Assurance Company*, had denied the authority of *Sparrow* v. *Carruthers*, whereas we certainly did not intend to shake the authority of that case, but only to decide the case then before the Court upon its own circumstances.

Rule discharged.

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May 5th.

BICKNELL *v.* KEPPEL.

Under a plea of the statute of limitations the Plaintiff gave in evidence a letter of the Defendant's, in answer to an application for payment of his debt, in which the latter referred the Plaintiff to his solicitors, by whose opinion he should be governed, adding, "they are in possession of my determination and ability," and also a conversation with the Defendant's solicitors, in which they stated, that if the Plaintiff had any letter which would bind the Defendant, the debt would be paid, if it amounted to 100*l.*; this being left to the jury a verdict was found for the Plaintiff; but the Court inclining to think it did not take the case out of the statute, granted a new trial.

THIS was an action for goods sold and delivered to the amount of 70*l.* to which the Defendant pleaded the general issue and the statute of limitations. At the trial before Lord *Alvanley* Ch. J. at the sittings after last *Hilary* term, it appeared that the debt had been contracted above six years before the commencement of the action; that the Defendant having been applied to for payment of the debt by a letter from the Plaintiff, dated the 23d of *July* 1803, wrote to the Plaintiff on the 26th of the same month, in the following terms: "I have received your letter of the 23d, and must refer you to Messrs. *C.* my solicitors, whose opinion always governs me. I recommend you to call on them, as it will save you the trouble of a journey to *W.* They are in possession of my determination and ability." In consequence of this letter a person on behalf of the Plaintiff having called on Messrs. *C.* and stated that he came on account of the Defendant's bill, was informed by them that the Defendant was out of town, but that if the Plaintiff had any letter which would bind the Defendant, the debt would be paid if it amounted to 100*l.* Lord *Alvanley* considered himself bound by the case of *Lloyd* v. *Maund*, 2 *T. R.* 760. to leave it to the jury, to decide whether the above letter, coupled with the subsequent conversation at Messrs. *C.*, amounted to an acknowledgment of a debt. The jury found a verdict for the Plaintiff.

A rule *nisi* for a new trial having been obtained on a former day,

Cockell Serjt. shewed cause, and insisted, that upon the authority of *Lloyd* v. *Maund*, Lord *Alvanley* did right in leaving to the jury the letter of the Plaintiff, and desiring

siring them to put their own construction upon it. He observed that the letter was of itself ambiguous, and was fit therefore to be submitted, together with all the other circumstances of the case, to the jury, and that their conclusion ought not now to be disturbed.

Shepherd Serjt. *contrà*, urged that the conversation with Messrs. *C.* only amounted to a promise that the Defendant should pay the debt if the Plaintiff had any letter which would bind him, but that the letter written by the Defendant contained no expression which could have that effect.

Sir JAMES MANSFIELD Ch. J. The letter written by the Defendant in the case of *Lloyd* v. *Maund* is very different from that written by the Defendant in this case. The turn of the letter in that case was, that it was unjust that the Plaintiff should do any thing to injure the Defendant, and that rather than pay any costs beyond those of defending the action the Defendant would go to gaol. But how could the Plaintiff send the Defendant to gaol, unless some debt was due? In the present case, although the term "ability" may seem to import that the Defendant owed something that he could not pay, yet I do not think there is sufficient in that expression unexplained to take the case out of the statute. When the case is tried again the Plaintiff may examine Messrs. *C.* as to the Defendant's ability, and as to any determination he had communicated to them respecting payment of the demand.

HEATH and ROOKE Js. concurring,

Rule absolute.

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May 5th.

EMDIN *v.* DARLEY.

This Court will not allow an attorney's lien upon the costs to prevent a set off in costs between the parties to a suit.

THIS was an application to the court to allow the costs of this action (in which the Plaintiff had been nonsuited) when taxed to be set-off against certain costs due from the Defendant to the Plaintiff, incurred by the former removing an indictment preferred against himself by the latter, from the *Sussex* quarter sessions into the King's Bench, and on which indictment the Defendant had been convicted.

Best Serjt. shewed cause, and insisted, that the Court would not take away from the Defendant's attorney the only security he had for the payment of his costs in the action, which would be the consequence of such a set-off being allowed.

But the *Court* observed, that the attorney's lien could not be allowed to interfere with the equitable arrangement of costs between the parties to the suit, and that as the attorney acts upon the credit of his client and has his personal security for payment of his costs, this Court always allows applications of this kind (*a*).

Rule absolute.

(*a*) Vid. *Hall* v. *Ody*, 2 *Bos.* & *Pull.* 28. and the cases there cited.

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May 7th.

SELLAR *v.* M'VICAR.

Policy on freight valued at 500*l.* on a voyage at and from *Demerara*, *Berbice*, and the *Windward* and *Leeward Islands* to *London*; the ship being at *Demerara*, an agreement was entered into by the master with a house there, for a freight from *Berbice* to *London*, the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demerara* to *Berbice*, and deliver them there; while proceeding from *Demerara* to *Berbice*, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight; held that it was not a loss within the policy.]

THIS was an action brought to recover the amount of the Defendant's subscription on a policy of insurance, dated the 27 *April* 1802, on a voyage "at and from *Demerara*, *Berbice*, and the *Windward* and *Leeward Islands* to *London*," and by the policy the insurance was declared to be on freight valued at 500*l.* The Defendant subscribed the policy for 2000*l.* at a premium of 35*s. per cent.*

The declaration stated a loss by a peril of the sea while the vessel was at *Demerara*. There was also a count in the declaration for money had and received. The Defendant pleaded *non assumpsit*, and paid 3*l.* 10*s.* into Court on the count for money had and received. The cause came on to be tried before Lord *Alvanley*, at the sittings at *Guildhall* after last *Trinity* term, when the jury found a verdict for the plaintiff on the count upon the policy for 200*l.* subject to the opinion of the court upon the following case.

The Plaintiff was owner of the ship *La Fraternité*, mentioned in the policy at the time of the loss and the insurance. In the month of *February* 1802, the ship then being at *Demerara*, (where she had discharged a cargo of slaves,) directly after the delivery of that cargo, *Walter Scott*, the master, entered into an agreement with the house of *Martins* and Co. for a freight for the said ship from *Berbice* to *London*, for a cargo to be put on board at *Berbice*, to be carried from *Berbice* to *London*. And it was at the same time agreed that she should take in a cargo of bricks and planks to be carried from *Demerara* to *Berbice*, and the whole of such cargo of bricks and planks was to be delivered at *Berbice*. No charter-party or any written agreement was entered into for the freight from *Demerara* to *Berbice*, but the usual and customary

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freight from *Demerara* to *Berbice* was to be paid; nor was any charter-party or any written contract entered into for such freight of the cargo from *Berbice* to *London*, but the usual and customary freight from *Berbice* to *London* was to be paid. The agreement at *Demerara* for so loading the ship was not a distinct or different agreement from *Demerara* to *Berbice*, and from *Berbice* to *London*, but was one entire agreement entered into at one and the same time. The ship took in the cargo to be carried from *Demerara* to *Berbice*, and afterwards broke ground for the purpose of proceeding from thence to *Berbice*, but after she had so broken ground, and whilst she continued at *Demerara*, by a peril of the sea she ran foul of another ship there, called the *Jupiter*, and received such damages that she was condemned and sold, and the cargo she had on board for *Berbice* was taken out of her and no freight was ever earned. *Berbice* lies entirely out of the usual track and course of a voyage from *Demerara* to *London*.

The question for the opinion of the court was, Whether the Plaintiff was entitled to recover? If the Court should be of opinion that he was entitled to recover, then the present verdict to stand; if otherwise, the verdict to be entered for the defendant.

Lens Serjt. for the Plaintiff, contended, that as the agreement under which the ship sailed was stated in the case to be one entire agreement, as soon as the ship broke ground at *Demerara* she began to earn freight according to the terms of that agreement, and consequently the policy attached; that although the agreement had two distinct objects in view, *viz.* that the ship should take a cargo from *Demerara* to *Berbice*, and another from *Berbice* to *London*, the latter of which had wholly failed, yet as the former had commenced, there was an inception of the risk described in the policy, and that according to the

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the terms of the policy the voyage insured might be considered as a voyage from *Demarara* to *London*, with liberty to take in a cargo at *Berbice*.

But the *Court* (stopping *Best* Serjt. who was to have argued *e contrà*) said, If it had been in the course of the trade for a ship to take in part of her cargo at *Demarara* and part of her cargo at *Berbice*, the case would have stood upon a very different ground. But here the first voyage from *Demarara* to *Berbice* had nothing to do with the voyage insured. The voyage insured was from *Demarara* to *London*, or from *Berbice* to *London*, or from any of the *Windward* or *Leeward Islands*, according to the place from which the ship might happen to sail on her voyage to *London*. Now in this case such voyage never commenced; the case itself excludes any inception of the voyage. The ship took in a cargo at *Demarara* to be carried to *Berbice*, and there expected to get the cargo which she was to carry to *London*.

Verdict to be entered for the Defendant.

BLAKER and Another *v.* ANSCOMBE

May 9th.

Certain lands, together with the woods, &c. were conveyed under a marriage settlement to *A.* and *B.* their heirs and assigns, during the life of *S. W.* in trust, to pay the rents and profits as the said *S. W.* should appoint, during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as the said *S. W.* should appoint; and for want of appointment, to the use of the children equally, &c. and the heirs of their bodies, with cross-remainders; and in default of such issue, to the use of the right heirs of *S. W.* for ever. Held that *A.* and *B.* could not maintain trover against the Defendant, a stranger, for certain trees, which had been cut down by order of the husband of *S. W.* and carried away by the Defendant.

TROVER for some trees. At the trial before *Heath* J. at the *Lent* assizes for *Sussex*, it appeared that by lease and release dated the 20th and 21st of *April* made after the marriage of *John Walder* and *Sarah* his wife, in pursuance of marriage articles, certain premises therein mentioned,

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mentioned, together with all woods, underwoods, and timber trees, were conveyed to one *Thomas Tourle*, his heirs and assigns, to the intent that he should be tenant to the *praecipe* for suffering a common recovery, the uses of which, when suffered, were declared to be to *Wm. Blaker* and *Walter Huborne* (the Plaintiffs) their heirs and assigns for and during the natural life of the said *Sarah Walder*, in trust, to pay the rents and profits in such manner as the said *Sarah*, notwithstanding her coverture, should appoint, and from and immediately after the decease of the said *Sarah Walder* to the use of such child or children of the marriage, and in such shares as the said *Sarah* should appoint, and for want of appointment to the use of the children, equally between them as tenants in common, and the heirs of their respective bodies, with cross remainders, and in default of such issue to the use of the right heirs of *Sarah Walder* for ever: that a recovery was suffered in pursuance of the settlement; that the trees which were the subject of the action, were cut down upon the premises mentioned in the settlement by order of *John Walder*, and taken away by the Defendant; that the trees were demanded by the Plaintiffs, and the Defendant refused to deliver them up. It was objected on the part of the Defendant, that the Plaintiffs under the settlement had only an estate *pur auter vie*; that the trees when standing were part of the inheritance, and when felled belonged to the owner of the inheritance, for which the case of *Bewicke* v. *Whitfield*, 3 *P. Wms.* 267. was cited, and that the Plaintiffs therefore were not entitled to maintain the action. A verdict however was found for the Plaintiffs, with liberty to the Defendant to move that a nonsuit should be entered.

Accordingly a rule *nisi* having been obtained for that purpose on a former day,

Best Serjt. now shewed cause, and contended, that although

though by the general rule of law the owner of the inheritance is entitled to timber felled upon the land, yet that the trustees in this case had such a special property in the trees as entitled them to maintain their action against a wrong doer.

Sir JAMES MANSFIELD Ch. J. (stopping *Bayley* Serjt.) How can it be made out that the trustees in this case had any greater estate than during the life of the tenant for life? If they had no greater estate they cannot possibly maintain this action. Had the limitation been to the trustees and their heirs, to the use of them and their heirs, the case might have been very different. It is true that the trustees had a special property in the trees while standing, but that property ceased when they were cut down.

HEATH J. It occurred to me at the trial that the estate of the trustees might possibly be considered as commensurate with the different limitations in the settlement; but I am now satisfied that the estate limited to them was only *pur auter vie*, and consequently that this action cannot be maintained. There is a distinction between limitations by settlement and limitations by will; in the latter case they are construed according to the intention of the testator, and then the trustees, under a limitation of this sort might be considered as having an estate commensurate with the subsequent limitations; but that mode of construction cannot be applied to a limitation by settlement.

ROOKE J. concurring,

Rule absolute

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If to a rejoinder concluding with a verification, the Plaintiff add the *similiter* and take the record down to trial and the Defendant obtain a verdict, the Court will not grant a new trial, but will amend the record.

GRUNDY *v.* MELL.

THIS was an action for goods sold and delivered. Plea *non assumpsit*, as to all but 15*l.* and as to the 15*l.* a tender before the commencement of the suit. The replication joined issue on the *non assumpsit*, and as to the plea of tender set forth a writ sued out before the tender, concluding with the usual verification. The Defendant in his rejoiner alleged, that he did before the suing out of any writ at the suit of the Plaintiff tender the said 15*l.* and concluded, "And this he is ready to verify, wherefore he prays judgment if the said Plaintiff ought to have or maintain his aforesaid action to recover any damages by reason of the non-payment of the said 15*l.* parcel as aforesaid, against him, &c." To this was added a *similiter*, "And the said Plaintiff doth the like." The record then went on: "Therefore as well to try *this issue* as the said other issue above joined between the parties aforesaid, the sheriff is commanded," &c.

This cause was tried at the last *Nottinghamshire Lent* assizes, when a verdict was found for the Defendant, both on the *non assumpsit* and the plea of tender.

A rule *nisi* was obtained by the Plaintiff early in this term, for setting aside this verdict, and granting a new trial, on the ground that there was no issue joined as to the tender, the rejoinder having concluded to the court instead of the country; and at the same time another rule *nisi* for amending was obtained by the Defendant.

Vaughan Serjt. now shewed cause against the first rule and supported the last, contending that the mistake was a mere informality, and cured by the statute of jeofails, the distinction being that where an immaterial issue is joined the Court must award a repleader, but where the issue is only informally joined it is cured by the statute. He referred

ferred to the case of *Bennet* v. *Holbeck*. 2 *Saund.* 317. and the notes thereon in the edition by Mr. Serjt. *Williams*, where all the cases on the subject are collected; and observed that in *Sayer* v. *Pocock*, *Cowp.* 407. where a *similiter* was allowed to be added after verdict, one of the reasons given was, that the Court only made that right which the Defendant understood to be so, by going down to trial.

Bayley, Serjt. *contrà*, insisted that neither party in this case had put himself upon the country as to the plea of tender, and that it would be impossible to indict for perjury any of the witnesses who gave evidence on this trial. He observed, that the Court by amending might enable the party to try the question again, but that they could not by the amendment remove the objection that none of the witnesses could be indicted for perjury. He added that in *Sayer* v. *Pocock*, one of the parties had put himself upon the country, which neither of them had here done.

But *The Court* were of opinion that they were warranted by the case of *Sayer* v. *Pocock* in amending this informality after verdict, for that the same difficulty respecting the indictment of the witnesses for perjury existed in that case as in this, since one of the parties there had not put himself upon the country.

Per curiam, Rule for a new trial discharged.
Rule for the amendment absolute.

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CHAMBERLAIN *v.* PORTER.

A promissory note drawn before the 37 *Geo.* 3. *c.* 136. upon a receipt stamp of equal value with that required for a promissory note, is not available in law.

THIS was an action on a promissory note for 20*l.* drawn in the year 1794. The cause was tried before *Grose* J. at the last assizes for *Cambridge*, when a verdict was found for the Plaintiff notwithstanding an objection taken to the note on account of the stamp, which was a sixpenny receipt stamp, instead of a note stamp of the same value.

On a former day a rule *nisi* was obtained for setting aside the verdict, and having a new trial.

Sellon Serjt. now shewed cause. The objection in this case is not that the note had not a stamp of a proper value, but that it has not the peculiar stamp appropriated to promissory notes. At the time this note was given the 31 *Geo.* 3. *c.* 25. was the only statute regulating the stamp duty on promissory notes. From that act it clearly appears that the Legislature did not intend to make any particular stamp necessary to a promissory note, but only contemplated a duty *ad valorem* being paid on notes. The terms used in the act are, that upon every promissory note above 5*l.* and not exceeding 30*l.* "shall be charged a stamp duty of sixpence." Indeed the meaning of the Legislature is explained by the sixth section, in which it is provided that if any promissory note contrary to the true intent of the act, shall be stamped or marked with a stamp or mark of a lower denomination or value than by the act is directed, the drawer shall be answerable to the crown for the duty. It is true that in *Manning* v. *Livie* *Bayley on Bills*, p. 20. note (*c*); and in *Robinson* v. *Drybrough*, 6 *T. R.* 317. where the stamps upon the instruments were composed of duties laid on by different statutes, a stamp *ad valorem* was held insufficient; but in the

the latter case there is a reference to a case of *Legge* v. *Tyte*, *E.* 30 *Geo.* 3, *B. R.* where a contrary doctrine was laid down, and in *Acheson* v. *Sharland*, 1 *Esp. N. P. Cas.* 292. Lord *Kenyon* admitted a promissory note in evidence, written upon a sixpenny receipt stamp, sixpence being the amount of the duty upon the note, and that duty not being compounded of several sums, but laid on by the same statute.

Praed Serjt. in support of the rule. The 22 *Geo.* 3. *c.* 33. which was the first act, imposing a duty on promissory notes, does not impose any duty on receipts, and the second section of that act enacts that the commissioners for the better levying the duties shall use and provide such stamps to denote the said several duties as shall be requisite in that behalf. When the commissioners therefore have provided a particular stamp for a particular instrument, it becomes the same thing under the above enactment as if the Legislature had expressly directed a peculiar stamp as applicable to that particular instrument only. In the 27 *Geo.* 3. *c.* 13. *s.* 41. the Legislature recites, that the duties on vellum parchment and paper are applicable to various purposes, and the commissioners are directed to keep separate accounts of the monies arising therefrom, and to provide distinct dies or stamps to denote each duty; and then to prevent the multiplication of stamps, empowers the commissioners to cause one new stamp, die, or mark to be provided to denote each rate of duty upon each piece of vellum, paper, or parchment. No stamp therefore can be deemed the stamp which the Legislature has directed, unless it be the stamp which the commissioners have required. Indeed the 23 *Geo.* 3. *c.* 49. which repealed the 22 *Geo.* 3. *c.* 33. has a similar provision, requiring the commissioners to provide such stamps as they shall deem necessary; and to keep separate accounts. The 31 *Geo.* 3. *c.* 25. preserves the

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the distinction between the stamps upon receipts and promissory notes, as well as the 35 *Geo.* 3. *c.* 55. and the 37 *Geo.* 3. *c.* 90. Indeed while the Legislature keep distinct the accounts of monies received from the different stamp duties, the several stamps cannot be blended, nor will the mere value of the stamp give validity to the instrument, unless it be also the proper kind of stamp. The intention of the Legislature upon this point may be collected from the preamble of the 37 *Geo.* 3. *c.* 136. which recites that deeds and other instruments cannot be given in evidence, nor are in any manner available, unless stamped with the proper stamps, provided for such purpose, and that from the variety of stamps provided for different purposes mistakes have arisen and may again arise in the use of such stamps, for want of knowing the proper denomination or value required in particular cases; and the 5th section provides that a bill of exchange or promissory note, drawn upon a stamp of an improper denomination but of equal or superior value, may be stamped by the commissioners on payment of the duty and a penalty. In *Manning* v. *Livie*, Lord *Kenyon* refused to allow a note to be read, which was on a deed stamp, and in *Robinson* v. *Drybrough*, his Lordship says, it is absolutely necessary that the distinction of the several stamps should be preserved in courts of justice as long as that distinction is kept up by the Legislature. When therefore he comes to revise the opinion given by him in *Acheson* v. *Sharland*, he thinks that a stamp *ad valorem* is insufficient: and in *Farr* v. *Price*, 1 *East*, 55. the Court determined that no other than the peculiar stamp appropriated by the law to the particular instrument will avail, even and though the stamp used be of greater value; nor is the authority of that case shaken by the case of *Taylor* v. *Hague*, 2 *East*, 414. where the Court held a promissory note upon a stamp of an higher value than was required, available on the particular ground that the value was composed of three

three different sums applicable to several funds to which the duties on promissory notes are carried.

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Cur. ad vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. The question is, Whether a promissory note written on a receipt stamp of equal value with that required for a promissory note is to be deemed a note available in law? It is not necessary to go through all the acts which have been cited, since none of them carry the matter further than the 37 *Geo.* 3. *c.* 136 That act is a clear legislative declaration that it is not sufficient that a certain sum of money be paid on the instruments which are the subject of taxation, but the stamp used must be of the proper denomination. A receipt stamp will not avail if used upon a note, nor a note stamp if used upon a receipt. The 37 *Geo.* 3. *c.* 136. contemplates the mistakes which might arise in the use of stamps, and makes provision for those mistakes. It enacts that where any instrument, except bills, notes, and drafts, shall have been stamped with a stamp of a different denomination, but of equal or greater value than that required by law, the commissioners, upon payment of the duty and a penalty of 5*l.*, may stamp the same with the proper stamp. With respect to bills and notes, which by 31 *Geo.* 3. *c.* 25. were forbidden to be stamped after they were made, it provides that bills and notes which should be made subsequent to 37 *Geo.* 3. *c.* 136. and stamped with an improper stamp, but of equal or greater value than the stamp required, might be stamped by the commissioners, on payment of the duty and a penalty. But bills and notes given before that act, remain in the same situation as if the act had not been passed. By the provisions there introduced, the Legislature plainly supposed that all instruments not stamped with a stamp of a proper denomination

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nomination were good for nothing; otherwise the provisions would be useless. Where an instrument is upon an improper stamp, the commissioners are authorized to stamp it, upon payment of a penalty and the duty; but bills and notes given before that act, are excepted from its operation; and yet if this note, which is not stamped with a stamp of the proper denomination, and which was drawn before that act, be good, it would be in a better situation than those bills and notes which the commissioners are authorized to stamp under the act, on payment of a penalty and the duty. Without therefore going further into the statutes or the cases, which all lead to the same conclusion, we think that in this case, unfortunate as it is, the note cannot avail, and consequently there must be a new trial. Had the 31 *Geo.* 3. *c.* 25. stood alone, there might have been strong ground to contend, that a stamp *ad valorem* would have been sufficient.

Rule absolute.

DANCE and Others *v.* GIRDLER and Others, Executors of HENRY CAPEL.

May 12th.

A bond was given to *A. B. C. &c.* payable to them and their successors, as the governors of the Society of Musicians, conditioned to secure *J. H.*'s faithfully accounting with them and their successors, governors, *&c.* as their collector; afterwards the society was incorporated by letters patent, at which time *J. H.* had duly accounted for all monies collected by him, but after the incorporation received money for which he did not account. Held that the obligor of the bond was not liable for such default of *J. H.* in an action on the bond,

DEBT on bond, dated the 5th *August* 1780, given by one *Jesse Horwood*, together with the Defendant's testator, to the Plaintiffs, and several other persons since deceased, governors of the Society of Musicians, for the then present year, payable to the said persons and their successors, as governors of the said Society of Musicians.

The Defendants craved oyer of the bond and condition, which latter was in these words; "Whereas the above

bounden

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bounden *Jesse Horwood* was on the 7th day of *August* 1763, by the majority of the members of the said Society of Musicians, elected into the office or employment of collector of the monies due and to grow due to the said Society: now the condition of the above-written obligation is such, that if the said *Jesse Horwood* do in all respects well and truly, justly and faithfully, pay to and account with the said *S. H.* &c. (the obligees) and their successors governors of the said Society of Musicians, for all such sum and sums of money, debts, dues, and demands which he shall receive or come to his hands or knowledge by virtue of any orders or directions from the said *S. H.* &c. (the obligees) or their successors, as governors of the said Society of Musicians, or otherwise, by virtue of his election as aforesaid, then the above-written obligation to be void, or else to remain in full force."

The Defendants then pleaded, 1st, *non est factum;* and 2dly, that the said *Jesse Horwood* did always, from the time of making the said writing obligatory, pay and account with the persons named in the bond and their successors, governors of the said Society of Musicians, for all sums of money which came to his hands by virtue of any orders from them or their successors, as governors of the said society, or otherwise, by virtue of his said election in the said condition mentioned, according to the tenor and effect of the said condition.

The Plaintiffs replied, that after making the bond and during the time the said *Jesse Horwood* continued in the said office, to wit, on the 1st of *January* 1802, and on divers other days and times between that day and the commencement of the suit, the said *Jesse Horwood*, by virtue of his said election into the said office, received divers sums, amounting to 569*l.* 19*s.* 11*d.* and had not accounted with the obligees for the same.

The Defendants rejoined, that *Jesse Horwood* had paid to and accounted with the Plaintiffs, who had survived

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the other obligees, for the said sum of 569*l.* 19*s.* 11*d.* in the replication mentioned to have been received by the said *Jesse Horwood*, by virtue of his election into the said office, and concluded to the country.

The cause was tried before HEATH J. at the *Westminster* sittings in this term, when it appeared that *Jesse Horwood* having been elected collector to the Society of Musicians in 1762, continued in that office till a short time before the commencement of the present action; that the Society of Musicians was a voluntary society until the year 1790, when the members of the society were incorporated by letters patent by the name of "the Royal Society of Musicians of *Great Britain*;" that by a regulation of the society in 1763, it was provided, that the collector should annually produce a certificate that he had duly accounted, signed by five governors, or that there should be a new election; that the said *Jesse Horwood*, until the year 1803, did annually produce such certificate; that the chairman annually put the question at a general meeting, Whether *Jesse Horwood* should be continued collector? To which there was never any opposition; that in the year 1803 *Jesse Horwood* had received the sum stated in the pleadings for which he had not accounted, but that he had accounted for every thing which had come to his hands before the date of the charter of incorporation. The learned Judge nonsuited the Plaintiffs, on the ground that as there was no deficiency in the accounts of *Jesse Horwood* previous to the incorporation of the society, the Defendants, as executors of his surety, were not liable; for that the not accounting with the governers of an incorporated society was no breach of the condition to account with the governors of the society, when not incorporated. But liberty was reserved to the Defendants to move to set aside the nonsuit, and have a verdict entered for the Plaintiffs.

Accordingly a rule *nisi* having been obtained on a former day,

Shepherd,

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Shepherd, *Lens*, and *Best*, Serjts. shewed cause. As a question was annually submitted to the members of the society, whether *Jesse Horwood* should be continued in the office of collector, this proceeding amounted to a new election every year, and consequently after the expiration of the year in which the bond was given, *Jesse Horwood* could not have received any money by virtue of the election mentioned in the condition of the bond. But independent of this objection, the Defendants are not liable for any monies received by him subsequent to the charter of incorporation. By the charter the original society was destroyed. The governors of the incorporated society, though consisting of the same individuals, are not the governors of the original voluntary society, which ceased to exist when the corporate society arose. The powers, the liabilities, and mode of conducting business of a corporate body are very different from those of a mere voluntary society; and it is possible that the Defendant's testator, who was willing to become a surety for *Jesse Horwood* as the servant of the one, might not be willing to be surety for him as the servant of the other. In Lord *Arlington* v. *Merrick*, 2 *Saund.* 411. where a bond had been given with a condition that one *T. J.* should faithfully account during all the time that he should continue deputy post-master, and the condition recited that *T. J.* had been appointed deputy post-master for six months, it was holden that the surety was not liable for the neglect of *T. J.* to account for monies received after the expiration of the six months. From which it appears that the condition of a bond given by a surety is not to be extended by construction. In *Wright* v. *Russel*, 3 *Wils.* 530. 2 *Bl.* 934. S. C. it was determined that a surety who had given a bond with a condition that one *W. B.* during the time he should continue as broad clerk to the Plaintiffs, should keep true accompts and pay all monies which he should receive belonging to the Plaintiff into his hands, was not

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liable for a default of *W. B.* after the Plaintiff had taken a partner into his house. To the same effect is *Barker* v. *Parker*, 1 *T. R.* 287. where the executor of the obligee carried on his trade after his death, and the person for whom the obligor was surety continued in his service. With respect to the case of *Barclay* v. *Lucas*, 1 *T. R.* 291 *in notis*, where the surety was holden liable after a new partner had been taken in, it may be observed that the condition of the bond recited that the obligees had agreed to take *P. J.* into their service as a clerk in their shop and counting-house, and Lord *Mansfield* expressly put the case upon the ground of the bond having been given as a security to the house. The late case of *Strange* v. *Lee*, 3 *East*, 484. is a strong authority for the Defendants. There the bond was conditioned for payment by one *B. B.* of all sums of money in which he should be indebted to the obligees for money advanced at their banking-house, and it was determined that the surety was not liable for money advanced at the banking-house, after one of the obligees had ceased to be a partner.

Marshall and *Bayley* Serjts. in support of the rule. With respect to the annual re-election of *Horwood*, the regulation of 1763 shews that the office was not to be vacant unless the collector omitted to produce a certificate, which he never omitted to do until the year 1803; and unless the office was vacant, the act of the chairman in putting the question, whether *Horwood* should be continued, was superfluous and inoperative. Moreover the condition of the bond which was given in 1780, recites that *Horwood* was chosen in 1763; if therefore he was collector in 1780 by virtue of his election in 1763, the annual act of the chairman could not, consistently with the recital of the bond, have had the effect which is now imputed to it. Then as to the effect of the charter of incorporation, the result of all the cases referred to amount

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to this, that in construing the condition of a bond given by a surety the Court is to look to the intention of the parties. The case of *Barclay* v. *Lucas* has established that where the bond is given for the fidelity of a servant as clerk to a house, the surety will be liable notwithstanding a change of partners; and *Lawrence* J. in the case of *Strange* v. *Lee*, said that the condition might have been so framed as to have made the surety liable notwithstanding the secession of one partner from the banking-house. In this case it is evident from the introduction of the word "successors," that the parties contemplated a change of persons; and though it be true that the corporate society is in some respects different from the original society, yet it is substantially only the same society, with new powers and privileges; and would be entitled to take the benefit of all contracts entered into with the old society.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. The principal defence set up in this case is, that the Society of Musicians, though it existed as a voluntary society, at the time when the bond was given, was put an end to in the year 1790, when a charter was granted by the Crown, not as the Plaintiffs contend, to that society, but to the several persons mentioned in the charter, who were at that time members of that society; that those persons were erected into a corporation perfectly different from the original society, that all obligation on the part of *Capel* as surety for *Jesse Horwood*, ceased when the society itself ceased to exist, and that he therefore was not answerable for money received by *Horwood*, as collector to the corporate society, he having only been surety for the payment of money received by *Horwood*, as collector to the old society. Another objection was taken

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to the Plaintiff's recovery, namely, that *Jesse Horwood*, at the time when he made default was not Collector under the old election referred to by the condition of the bond. But considering the condition of the bond, which is dated in 1780, recites an election in 1763 as the election under which *Horwood* then continued to be collector, I think it would be difficult to contend that he was not still collector under that in 1803, if the voluntary society had then continued to exist. Besides which the regulation of the society, which was given in evidence, is inconsistent with the idea of an annual election: for that regulation provides, that if the collector do not produce a certificate, there should be a new election. But if an annual election was to take place, the office must have been vacant every year without that provision. If therefore the voluntary society had continued, I think that it would have been impossible to sustain this objection. The question therefore must turn on the other objection. About the facts of the case there is no doubt. The charter was accepted in 1790; from that time to this it has been acted upon, and there has been no meeting of the voluntary society which existed before the incorporation. The rights of the corporation are totally different from those of the society which existed when the bond was given. The bond itself is inaccurately drawn; being given to certain persons as governors of the society, and their successors. The intention, no doubt, was that the bond should be payable to those who should succeed the obligees as governors. But this the law does not allow: and the bond can only be considered as given to the twelve obligees, and would ultimately have been payable to the representative of the last surviving obligee. The condition also proceeds upon the same idea. But probably it would not be deemed ineffectual on that account; and the condition would perhaps be construed to mean that the collector should account to those persons who in future

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future should happen to be governors. The charter grants that in future there shall be a perpetual society called by the name of "The Royal Society of Musicians of *Great Britain;*" not that the society then existing shall be perpetual. This therefore is a new body which never existed until the year 1790, from which time the voluntary society ceased to exist; and if so, the surety is not bound to answer for money received by *Horwood* since that period. It is a principle established by all the cases that the contract of a surety is not to be extended by implication. The case of *Barclay* v. *Lucas* does not say, that the contract may be extended by implication, but only lays down that the contract must be construed according to the intention of the parties; and the Court of King's Bench, in that case thought that according to the true construction of the contract the surety was liable, notwithstanding a change of partners had taken place. It being agreed then that the contract entered into by a surety cannot be extended by any implication, but must take its effect according to the terms of it; has the surety in the present case entered into any contract to be security to the present existing corporation for the fidelity of *Jesse Horwood?* Certainly not. There was no such corporation in contemplation in 1780. The only persons with whom he entered into any obligation were the twelve persons who are described as governors, and the condition goes no further than to provide that *Horwood* shall account to them and their successors. But *Horwood* cannot now account in the manner required by the bond: for no such persons exist. If the society is gone, the governors of that society are gone also. This seems to me to be a stronger case in favour of the surety than those which have been cited. For here there is no circumstance from which it can be inferred that the parties considered the two societies as the same. Perhaps if *Capel* had been called upon, he might have entered into a new

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new obligation. But the old obligation does not in point of law extend to the new corporation, and the surety has a right to avail himself of the objection. Had *Horwood* made several defaults subsequent to the charter of incorporation, and *Capel* paid the deficiencies from time to time, his conduct might perhaps have afforded ground for relief in a Court of Equity. But that must be a very clear case. And no such facts exist here. There was one argument relied upon for the Plaintiffs, which does not seem to me to have any application to the case. It was said that all contracts entered into with the voluntary society before the incorporation, remained after the charter. No doubt the contracts remained to the persons with whom they were entered into. And this particular bond now remains as an obligation to the original obligees. But the question is, What is the effect of the bond? It is a bond that the collector shall account as the condition requires. How is that required? He is to account to the governors of the old society: which brings the question to the same point, whether the old society existed or not at the time of the default? It is not necessary to go through all the cases which have been referred to, all of which proceed on this principle, that a surety can only be holden liable according to the plain and clear force of his contract. The last case, of *Strange* v. *Lee*, decides this point most clearly. And I mention that case because one cannot deny that it only differs in words from the case of *Barclay* v. *Lucas*. In *Strange* v. *Lee*, one of the original partners was dead, and another taken in: and the question was, Whether the surety remained liable? The Court declared that he was not. And Lord *Ellenborough* seems to have relied on the death of one of the partners as having been alone sufficient to put an end to the liability. If that be so, how much more must the incorporation of a society have that effect? In the case of the death of one partner, all contracts remain to the survivors. But that

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is not so where a society of individuals is erected into a corporation. It is possible that *Capel* might not have objected to become security to the corporation, and that there may have been no difference in the mode of accounting. But still there might be a difference. The society may have been more careful than the corporation. They may have appointed persons to superintend the collector, which may have been omitted by the corporation. A voluntary society is essentially different from a corporation. The individual members are liable for debt in the one case, and only the corporate funds in the other. But without entering into the substantial difference between a voluntary and a corporate society, it is sufficient to say, that according to all the cases which have been cited, as well as others which might be found, this surety was not bound to answer for sums received after the charter of incorporation, which constituted a perfectly new body of persons in the judgment of the law.

Rule discharged.

JUDIN *v.* SAMUEL.

May 14th.

THE declaration stated, that the Defendant "was attached to answer the Plaintiff in a plea of trespass on the case." The first count was in trover for certain promissory notes and 2200*l.* in monies numbered. The second count stated, that whereas the Plaintiff, at the special instance and request of the Defendant, had delivered to the Defendant two other notes (describing them) which

The first count of a declaration being in trover for bills of exchange, and the second and third counts, stating the delivery of the bills to the Defendant, in order that he might get them discounted for a certain commission, and his having got them discounted, and his converting and disposing of the money to his own use; the Defendant demurred generally, on the ground of a misjoinder of tort and contract, the subject of the two last counts being matter of contract; but the court held, that on a general demurrer, as all the counts were in the form of tort, judgment must be for the Plaintiff, if any one count was good.

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which said notes were indorsed in blank on behalf of the Plaintiff, and were of great value, to wit, of the value of 2000*l.*, to the intent that the Defendant, for certain commission and reward to be therefore paid by the Plaintiff to the Defendant, might procure the said two last-mentioned notes to be discounted for the use of the Plaintiff; and the Defendant took and accepted the said two last-mentioned notes for the purpose aforesaid, and afterwards did procure them to be discounted, and thereupon received a large sum of money, to wit, 1999*l.* as and for the discount of the said notes. Nevertheless the Defendant, not regarding his duty in this respect, but contriving and fraudulently intending to deceive and defraud the Plaintiff in this respect, hath not, although often requested, paid the said sum of money so by him received, as and for the discount of the said notes, or any part thereof, to the Plaintiff, but on the contrary converted and disposed thereof to his own use. The third count stated the delivery of the notes to the Defendant, to the intent that he might thereby raise and procure to the use of the Plaintiff, certain sums of money, or account with the Plaintiff for the said notes, or for such sum of money as he should raise or procure thereon; that the Defendant took and received the notes for the purpose aforesaid, yet not regarding his duty, but intending to injure the Plaintiff, had not accounted with the Plaintiff for the notes or for any money raised or procured thereon. To this declaration there was a general demurrer and joinder thereon.

Best Serjt. in support of the demurrer, insisted, that although the two latter counts were in the form of tort, yet as they stated nothing but what was matter of contract, they must be considered as founded on contract, and consequently could not be joined with a count in trover. He cited the case of *Buddle* v. *Wilson*, 6 *T. R.* 369

369. in which the doctrine of *quasi ex contractû* was adopted by the Court, so as to affect a declaration in the form of tort with the consequences attending a declaration in *assumpsit*, and said, that the old form of pleading, *viz.* that the Defendant *suscepit super se* was relied upon as shewing an action to be *ex contractû*, though in form a tort.

Bayley, Serjt. *contrà*, contended, that it was quite immaterial whether the Plaintiff ought to have declared in *assumpsit* upon the matters contained in the two last counts, for as the demurrer was general to the whole declaration the Plaintiff would be entitled to judgment if the declaration contained any one good count, which the first clearly was; and that with respect to the misjoinder, as the two last counts were in the form of *tort* as well as the first, the same plea might be pleaded to the whole declaration, and the same judgment might be given upon it, which had been decided to be the true criterion of determining what counts might be joined. He cited *Dickson* v. *Clifton*, 2 *Wils.* 319. and *Brown* v. *Dixon*, 1 *T. R.* 274 as authorities precisely in point.

Sir JAMES MANSFIELD Ch. J. This question is rather new to me: but I do not see how the two latter counts, supposing them to be bad, as being drawn in *tort* instead of *assumpsit*, can, on a general demurrer, affect the first count to which no objection can be stated. Perhaps the Defendant might have demurred to the two last counts, and upon that demurrer have obtained judgment: but the course which the Defendant has pursued calls upon the Court to give judgment for or against the Plaintiff upon the whole declaration. There is nothing upon this declaration as it stands to which *non assumpsit* could be pleaded.

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HEATH J. Different causes of action may be joined in the same suit where the same process is used, and the same judgment follows, and it would be very inconvenient in practice if it were otherwise. In *Mast.* v. *Goodson*, 3 *Wils.* 348. this Court was of opinion that a count upon a cause of action to which a contract is only inducement may be joined with a count upon a tort.

ROOKE J. I am of the same opinion.

Judgment for the Plaintiff.

Mr. Justice CHAMBRE was absent this term on account of indisposition.

THE END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Forty-fourth Year of the Reign of GEORGE III.

(IN THE EXCHEQUER CHAMBER.)

HARWOOD *v.* Sir JACOB ASTLEY, Bart. in Error.

June 6th.

Defamatory words which are actionable in themselves, are not the less so, because they are alleged to have been spoken of one as a candidate to serve in parliament. In such an action it is not necessary to set out the writ, in order to shew that the Plaintiff was a candidate.

THIS was a writ of error from a judgment of the Court of King's Bench in an action on the case for defamation. The Plaintiff (below) declared "for that whereas a short time before the speaking and publishing the several false, scandalous, malicious, and defamatory words hereinafter mentioned, the said Plaintiff had been and had served as knight of the shire in the last parliament of our Lord the King for the county of *Norfolk:* and whereas also the said Plaintiff at the time of the speaking and publishing the several false, scandalous, malicious, and defamatory words hereinafter mentioned, was a candidate to be one of the knights of the shire to serve

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serve in the present Parliament of our said Lord the King for the said county of *Norfolk*, to wit, at *Thetford* in the said county of *Norfolk*, and was also then and there one of the justices of our said Lord the King aforesaid to keep the peace of our said Lord the King in and for the said county of *Norfolk*: and whereas also Sir *Edward Astley* bart. who was the father of the said Plaintiff, had a little before the time of the speaking and publishing the several false, scandalous, malicious, and defamatory words hereinafter mentioned, to wit, on, &c. died, to wit, at, &c.: and whereas the said Plaintiff hath always had a good name, character, and reputation, and hath always conducted himself as a man of integrity and honour, and hath never been guilty of any baseness or villainy whatsoever, nor hath ever been guilty of the assassination or murder of any person whatsoever, or of any such horrible and heinous crimes, nor until the speaking and publishing of the several false, scandalous, malicious, and defamatory words hereinafter mentioned, was ever believed, thought, or suspected to be guilty of any baseness or villainy whatsoever, or to be guilty of the assassination or murder of any person whomsoever, or of any such other horrible and heinous crimes, but on the contrary thereof was considered and esteemed, as well by a great number of the freeholders of the said county of *Norfolk* then and there having a right to vote in the election of knights of the shire to serve in the present parliament for the said county, and by other good and worthy subjects of our said Lord the King, as a man of integrity, worth, and honour, and had deservedly obtained and acquired their goodwill, esteem, confidence, and respect, to wit, at, &c.; yet the Defendant (below) well knowing the same, but contriving and maliciously intending to prejudice and injure the said Plaintiff in the opinion and esteem of the freeholders of the county of *Norfolk* then and there having a right to vote in the said election of knights of the shire to serve in the present

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present parliament for the said county, and to hurt, injure, defame, and scandalize the said Plaintiff in his aforesaid good name, character, and reputation, and to cause him to be looked upon as a man of no integrity or honour whatsoever, and wholly undeserving of the good-will, esteem, confidence, and respect of all his Majesty's subjects, and to cause and procure it to be suspected, thought, and believed that the said Plaintiff was an assassin and a murderer, and moreover that he had been guilty of the most horrible crime of murdering his own father, and as much as in him the said Defendant lay to subject the said Plaintiff to the pains and penalties provided by the laws of this realm against such horrible crimes, afterwards, to wit, on, &c. at, &c. said, spoke, and with a loud voice published and declared, in the presence and hearing of a great number of freeholders of the said county of *Norfolk* then and there having a right to vote in the election of knights of the shire to serve in the present parliament for the said county, and in the presence and hearing of divers other good and worthy subjects of our Lord the King of and concerning the said Plaintiff *as such candidate* as aforesaid, the false, feigned, scandalous, malicious, and defamatory words following, that is to say, "Sir *Jacob Astley*," (meaning the said Sir *Jacob Henry*, the now Plaintiff) "is a scoundrel, a coward, and a liar, an assassin, and a murderer; he," (meaning the said Sir *Jacob Henry*) "murdered his" (meaning the said Sir *Jacob Henry's*) "own father," (meaning the said Sir *Edward Astley* deceased.) And the said Defendant, of his further malice against the said Sir *Jacob Henry*, and again contriving and maliciously intending as aforesaid, afterwards, to wit, on, &c. at, &c. said, spoke, and with a loud voice, published and declared, in the presence and hearing of a great number of the freeholders, &c. The second, third, and fourth counts went on in the same form as the first, only varying the words spoken; and the fourth count confining

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the charge to these words, "He is an assassin and a murderer." There were four other counts, laying the words as in the four first, but only charging an intention to injure the Plaintiff in his character, and subject him to the penalties of the law, and omitting the averment that the words were spoken of the Plaintiff as a candidate. The declaration concluded thus: "By reason and means of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words by the said Defendant as aforesaid, the said Plaintiff was not only greatly prejudiced in the opinion and esteem of divers of the freeholders of the said county of *Norfolk* who then and there had a right to vote in the election of knights of the shire to serve in the present parliament of our said Lord the King for the said county of *Norfolk*; but hath also fallen into great contempt and disgrace with, and hath wholly lost the good opinion and esteem of divers good and worthy subjects of this realm, and hath been, and is greatly injured, defamed, and scandalized in his aforesaid good name, character, and reputation, and is looked upon as a man of no integrity or honour, and wholly undeserving of the good will and esteem, confidence and respect of all his Majesty's subjects, and hath been and is suspected, thought, and believed by persons to whom his innocence in this behalf was and is unknown, to be an assassin and a murderer, and moreover that he has been guilty of the most horrible crime of murdering his own father. Whereupon the said Plaintiff saith "he is injured, and hath sustained damages to the amount of ten thousand pounds," *&c.* To this declaration the Defendant pleaded not guilty, and a general verdict having been found for the Plaintiff for 2000*l.* damages, judgment was given for the Plaintiff in the King's Bench; whereupon a writ of error was brought in this Court.

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Plowden for the Plaintiff in error. The damages being entire, if any one count in the declaration be bad, this judgment must be reversed. The words for which the action is brought are averred by the Plaintiff, in the fourth count, to have been spoken of him as a candidate, and for the speaking these words a pecuniary compensation in damages has been demanded and awarded. The question then is, Whether the Plaintiff be entitled as a candidate to bring this action? for by the allegations of his declaration he has confined himself to the injury arising to him in that character. He might indeed have maintained an action for the words, if spoken of him, without reference to his situation as a candidate to represent the county; and if the averment that the words were spoken of him in that character had been omitted, the declaration would have been good. But where a Plaintiff, by an unnecessary allegation, shews that he has no cause of action, the allegation cannot be rejected as surplusage. *Plowd* 84. *b*. The situation of a representative in parliament is not to be considered as an office of profit: the loss of that situation therefore cannot be compensated by pecuniary damages. The person who offers himself as a candidate invites the publication of all his faults. It is for the benefit of the public that his character should be discussed and made known. Being a candidate for a popular election, he waves all right to an action for defamation, founded upon matters spoken of him in that character. The Plaintiff therefore has mis-stated his title to damages, having by his own averment, confined his complaint to the exercise of a constitutional duty by the Defendant. In the several cases of actions for defamation, where it has appeared that the Plaintiff has been a representative in parliament, or a candidate for that situation, it is remarkable that the Judges have never intimated that damages could be given for any words spoken of the persons defamed as representatives in parliament, or candidates for that situation,

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In *How* v. *Prinne*, 2 *Ld. Raym.* 812. 2 *Salk.* 694. 2 *Lutw.* 1293 and 7 *Mod.* 107. where the Plaintiff was stated to be a justice of the peace, a deputy lieutenant, and a candidate for the county, Lord *Holt*, according to the three first reporters, wholly omits any mention of the Plaintiff's situation as a candidate; and, according to the last reporter, though he expressly states the words to be actionable, because spoken of the Plaintiff as a justice of the peace and a deputy lieutenant, yet only mentions the Plaintiff's design to stand for a parliament-man and the Defendant's knowledge of that fact as an indication of malice. In the case of *Walmsley* v. *Russell*, 2 *Salk.* 696. where the declaration stated that the Plaintiff was chancellor to the bishop, and stood for parliament-man, there is no intimation that damages could have been recovered on account of the words being spoken of the Plaintiff in the latter capacity. The only question was, Whether the words touched him in his office. The same observation applies to the case of *Row* v. *Sir Thomas Clarges*, *Sir T. Raym.* 482. 3 *Lev.* 30. 3 *Mod.* 26. In the argument of *Onslow* v. *Horne*, 3 *Wils.* 177. 2 *Bl.* 750. it was strongly contended that a seat in parliament was not an office, and that no action could be maintained for words spoken of a person merely as a member of parliament, and that freeholders ought to have the liberty of speaking their thoughts and opinions respecting the conduct of their representatives in parliament; and this doctrine was not contradicted by the court. In this case therefore, though the words spoken might have been actionable, had they not been uttered with reference to the particular character of the Plaintiff as a candidate, yet as they are expressly confined by the declaration to the character of the Plaintiff as candidate, no action can be maintained upon them. Besides, in this case the Plaintiff, in order to shew that he was a condidate, ought to have shewn that there was an approaching election at the time when the

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the words were spoken, by setting forth the writ: that was done in *How* v. *Prinne*, 2 *Lutw.* 1293.

Sir JAMES MANSFIELD Ch. J. (stopping *Erskine*, who was to have argued *e contrà*). It was quite unnecessary to set forth the writ in the declaration. It was sufficient for the Plaintiff to state that he was a candidate to serve in the present parliament, which could not have existed without a writ to call the parliament together. The fourth count of the declaration charges the Defendant with having said of the Plaintiff that he was an assassin and a murderer, with reference to his situation as a candidate to serve in parliament. The declaration avers that these words were spoken with intention to charge the Plaintiff with the crime of murder, and it was impossible for the jury conscientiously to find a verdict for the Plaintiff unless they believed that the Defendant was guilty of maliciously speaking those words in the only sense in which they were actionable, *viz.* as affixing upon the Plaintiff the clear, simple imputation of the crime of legal murder. It is impossible for this court to consider whether the Defendant intended to use the words in that sense or not; the jury must be taken to have believed that the Defendant did intend to impute to the Plaintiff the real crime of legal murder. That being the case, there is no doubt that the words stated in the fourth count are actionable in themselves. It is objected, however, that as the words are alleged to have been spoken of the Plaintiff as a candidate to serve in parliament, no action can be maintained for them. But if the words be actionable in themselves, it is quite immaterial whether they were spoken of him as a candidate or not. It seems to be supposed that the situation of a candidate for parliament is such as to make it lawful for any man to say any thing of him. To that proposition I cannot assent; nor is it to be collected from any of the cases which have been cited. It would be a strange doctrine indeed that,

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when a man stands for the most honourable situation in the country, any person may accuse him of any imaginable crime with impunity. The particular situation of the Plaintiff then cannot prevent the words from being actionable. With respect to the argument that words not actionable in themselves will not become actionable because spoken of a member of parliament or a candidate, it has no application to this case where the words are actionable in themselves. No objection therefore can be raised to this judgment, unless the proposition can be maintained, that it is lawful to say any thing of a candidate, Several cases have been referred to; but they have no application to this case. As far indeed as they go, they support the judgment of the court below; for they state, either as a ground of action or of aggravation, that the Plaintiff was a candidate to be a member of parliament. My brothers concur with me in thinking that the objection to the declaration is unfounded, and that the judgment ought to be affirmed.

Judgment affirmed.

This Judgment was affirmed in the House of Lords, after argument.

June 7th.

The Court will discharge a *feme covert* Defendant upon a common appearance, though she contracted the debt as a *feme sole*, and was trusted by the Plaintiff as such unless she represented herself to be single.

COLLINS and Another v. ROWED.

A RULE having been obtained by *Onslow* Serjt. calling on the Plaintiffs to shew cause why the bail-bond should not be delivered up to be cancelled, on entering a common appearance, upon affidavit that the Defendant was a married woman at the time the debt was contracted, and that the husband was still living;

Best Serjt. shewed cause, and produced an affidavit, denying the Plaintiff's knowledge of the Defendants' coverture at the time the debt was contracted, and stating that

that she appeared as a *feme sole*, and carried on business as a milliner in *St. Alban's Street*, and that the Plaintiffs trusted her as a *feme sole*, and that since the contracting of the debt she had made several promises to pay, and offered another person's security. He cited *Pearson* v. *Meadon*, 2 *Bl. Rep.* 903. and *Wilkins* v. *Wetherill*, 3 *Bos. & Pull.* 220.

Onslow Serjt. contended that unless the Defendant actually represented herself to be a *feme sole* she was entitled to her discharge, and cited *Hilden and Another* v. *Sandon* in this Court, *Hil.* 43 *Geo.* 3. where the Court made a similar rule absolute, though it was there sworn that the Plaintiffs did not know of the Defendants coverture, and that she appeared as a *feme sole*, calling herself the Hon. Mrs. *Sandon*, that her husband was at the time of contracting the debt a prisoner in the *Fleet* under the name of "*Fitzhugh*;" that she was reputed in the neighbourhood of the street in which she lived to be a single woman; that she procured goods from the Plaintiffs for the purpose of selling or pawning them for ready money, and actually so disposed of them; and that the Plaintiffs would not have trusted her had they known she was a married woman. *Bayley* Serjt. for the rule. *Onslow* Serjt. against it. He further stated that in *Wilkins* v. *Wetherill* it appeared by the affidavit of the Plaintiff (which he produced) that the Defendant signed the warrant of attorney in her maiden name, with a view to conceal her marriage, which was a secret to the family in which she lived.

The Court said, that it was not now the practice to refuse to discharge a married woman merely because her coverture was not notorious, and the Plaintiff had trusted her as a *feme sole;* that if a woman deceives the Plaintiff with respect to her condition by a falsehood, the Court will not discharge her; but that in the present case, as

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the Defendant had not used any deceit by representing herself as a *feme sole*, she was entitled to be discharged.

Rule absolute.

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BULPIT *v.* CLARKE.

The 11 *Geo.* 2. *c.* 19. respecting avowries in replevin does not extend to an avowry for a rent charge.

The Defendant in replevin having made cognizance for rent service as bailiff of *A. B.* and *C.* who were lawfully *possessed* of a certain manor of which the *locus in quo* was parcel, and holden at a certain rent, the Plaintiff replied that *A. B.* and *C.* were not seised in their demesne as of fee of the manor, Held bad on demurrer.

REPLEVIN. The Defendant first pleaded *non cepit*, he then made cognizance as bailiff of *R. W.*, *W. F. B.*, and *T. C.*, and alleged that the place in which, *&c.* was parcel of a certain tenement called *Barkham*, and that the Plaintiff enjoyed the said tenement called *Barkham* under a grant thereof theretofore made, at a certain yearly *rent-charge*, to wit, the yearly rent-charge of *3l.* payable at *Michaelmas* in every year, from *Michaelmas* 1801 to *Michaelmas* 1802, and from thence until and at the said time when, *&c.*; and because *3l.* of the rent-charge aforesaid, for one year ending at *Michaelmas* 1802, were in arrear, he acknowledged the taking as and for a distress tor the said *rent-charge* so in arrear. He also made cognizance as bailiff of the same persons, alleging that the place in which, *&c.* was parcel of a certain tenement called *Barkham*, *holden* of the manor of *Bentworth*, *at and under a certain yearly rent*, to wit, the yearly rent of *3l.* payable at *Michaelmas* in every year, of which said manor the said *R. W.*, *W. F. B.*, and *T. C.*, before and at the time at which the rent thereinafter mentioned to be distrained for became due, were *lawfully possessed*, and that the Plaintiff held the said tenement from *Michaelmas* 1801 to *Michaelmas* 1802, and from thence until and at the said time, when, *&c.*: and because *3l.* for one year's rent were in arrear, acknowledged the taking for a distress. The Plaintiff, after taking issue on *non cepit*, demurred

murred generally to the first cognizance. As to the second cognizance, he first traversed that the place in which, &c. was parcel of the supposed tenement called *Barkham*, holden of the manor of *Bentworth*, at the supposed rent of 3*l.*; then 2dly, he pleaded in bar that the said *R. W.*, *W. F. B.*, and *T. C.* were not, at the said time at which the supposed rent mentioned to be distrained for became due, and from thence until the said time when, &c. seised in their demesne, as of fee of the said manor of *Bentworth*; then 3dly, he traversed that the supposed tenement was holden of the said *R. W.*, *W. F. B.*, and *T. C.* as of their manor of *Bentworth*, at the supposed rent of 3*l.*; and then 4thly he pleaded that the said *R. W.*, *W. F. B.*, and *T. C.* were not, nor was, nor were any other person or persons whose estate they at the said time when &c. had of and in the said manor, at any time within 50 years next before the said time, when, &c. seised of the said supposed yearly rent of 3*l.* in their demesne as of fee by the hands of the said Plaintiff, or of any other person or persons whomsoever, as by the hands of their very tenant or tenants thereof.

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The Plaintiff joined in the demurrer to the first cognizance, took issue on the traverse in the first plea in bar to the second cognizance, then demurred specially to the second plea in bar, and assigned the following causes. "Because the said plea in bar neither denies any thing alleged in the same cognizance, nor confesses and avoids the matters therein contained. And because the said Plaintiff attempts, in and by his same plea in bar, to put him the said Defendant to prove that the said *R. W.*, *W. F. B.*, and *T. C.* were seised in their demesne as of fee of the said manor in the same cognizance mentioned, before and at the time when the said rent distrained for became due, which is not alleged in the same cognizance, nor is necessary to be so alleged, nor necessary to entitle them to receive the said rent, nor necessary to entitle them or their

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their bailiff to distrain for the same rent when due and unpaid, or to maintain such distress. And because the matter alleged in the same cognizance is wholly foreign to the question and tending only to unnecessary length of pleading, because if the allegation of the said persons being so seised, was necessary to support the said cognizance, the said Plaintiff should have demurred thereto for want of such allegation." The Defendant next took issue on the traverse in the third plea in bar; and lastly, demurred specially to the fourth plea in bar, and assigned the following causes. "Because the said plea in bar neither denies any thing alleged in the same cognizance, nor confesses and avoids the matters therein contained. And because the said Plaintiff attempts, in and by his same plea in bar, to put him the said Defendant to prove that the said *R. W.*, *W. F. B.*, and *T. C.*, or some person whose estate they have, or at the said time when, *&c.* had in the same manor, at some time within 50 years next before the said time when, *&c.* were seised of the same yearly rent in their demesne as of fee by the hands of their very tenant, which is not alleged in the same cognizance, nor is necessary to be so alleged, nor necessary to entitle them to receive the same rent, nor necessary to entitle them or their bailiff to distrain for the same rent, when due and unpaid, or to maintain such distress. And because the matter alleged in the same plea in bar is wholly foreign to the question, and tending only to unnecessary length of pleading, because if such allegation of the said persons being so seised of the said rent was necessary to support the said cognizance, the said Plaintiff should have demurred thereto for want of such allegation." The Plaintiff joined in the issues tendered, and in the demurrers.

Lens Serjt. for the Plaintiff. The principal question is, Whether the Defendant making cognizance for a rent charge

charge in terms, be at liberty to make cognizance in the mode first introduced by the 11 *Geo.* 2. *c.* 19. *s.* 22.? Before that statute such a cognizance would clearly have been bad, and the words of that statute do not seem to apply to the present case. The preamble of *s.* 22. recites, that "great difficulties often arise in making avowries or cognizance upon distresses for rents, quit-rents, reliefs, heriots, and other services," in which words a rent-charge is not comprehended, not being a service. All the different matters enumerated in the statute indicate tenure, which a rent-charge does not. The enacting part of the clause still more plainly shews that nothing was in contemplation but services; for it provides that the Defendant may avow generally that the Plaintiff enjoyed the land under a grant or demise, at a certain rent, during the time when the rent distrained for incurred; which can only apply to the case of a rent reserved upon a grant or demise by the grantor or lessor, and not to the case of a rent charged upon the land by the owner himself. The case of *Lindon* v. *Collins*, *Willes* 429. has expressly decided that a rent-charge is not within the words of the statute.

Bayley Serjt. was then called upon by the Court to support the cognizances. There are two sorts of rent-charge, one of which is within the words of the statute, and the other is not. If the owner of an estate grant a rent issuing out of that estate to a stranger, with a clause of distress, this is a rent-charge, and is not within the statute: for the grantor of the rent-charge does not enjoy the land under any grant or demise from the grantee of the rent. But if the original owner of the land alien the land in fee, reserving a rent with power of distress, this also is a rent-charge; for since the statute of *quia emptores* a man cannot grant an estate to be holden of himself in fee, and consequently the rent reserved cannot be a rent service; and yet the alienee enjoys the land under a grant from the

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the alienor to whom the rent is due, which brings the case within the very words of the statute. And it is to be observed that the words of the statute do not require that the premises should be holden of the person to whom the rent is due, since the word used is not "holden," but simply "enjoyed."

The Court were of opinion that a rent-charge was not within the 11 *Geo.* 2., and could not therefore be avowed for in the way pointed out by that statute. They referred to that part of the twenty-second section of the act, which describes the form of the avowry, namely, that it shall and may be lawful to and for all Defendants in replevin to avow or make cognizance generally that the Plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise, at such a certain rent, during the time whereon the rent distrained for incurred, which rent was then and still remains due, as demonstrating that the act was not meant to apply to a rent-charge, which does not issue out of the land as a service. They observed, that supposing land to be granted in fee, charged with a certain rent, it could not be said that the land is enjoyed at that rent, though a clause of distress might be inserted in the deed.

Bayley in support of the demurrer to the pleas The second cognizance falls precisely within the 11 *Geo.* 2.; for it states the land to have been holden at a certain rent, which is a rent-service. The Defendant must shew that he is entitled to the rent, and that it is due. Now the mode by which the Defendant shews this is, by pleading that the land is parcel of a tenement holden of the manor of *Bentworth;* that certain persons to whom the Defendant is bailiff, were possessed of the manor; and that the Plaintiff held the said tenement at a certain rent. Since the 11 *Geo.* 2. it is not necessary that a party should

should allege a seisin in fee, or deduce his title: for the object of the act was, to enable the *dominus pro tempore* to recover without setting out his title. But the Plaintiff, in answer to the plea, alleges, that the persons under whom the Defendant makes cognizance had no right to distrain, because they were not owners of the fee, and therefore requires the Defendant to shew what their title is. It appears by the cognizance that they were lawfully possessed of the manor, which lawful possession gave them a right to distrain. The object of the 11 *Geo.* 2. was to shorten the pleadings, whereas the tendency of these pleas is to compel the Defendant to set out a long title by way of replication.

Lens Serjt. *contrà*. It may be admitted that the statute gives to Defendants in replevin the power of stating their titles shortly. But the present Defendant has contented himself with bare possession. But where the title of the Defendant, or those under whom he makes cognizance, must come in question, it ought to be set out. The object of the statute was to enable persons to commence actions without alleging their titles, in cases in which (as most frequently happens) the title is not to come in question. In this case the Plaintiff means to shew a defect in the Defendant's title. Before the 21 *H.* 8. *c.* 19. lords were under difficulties in making avowries from not knowing who were their very tenants. That statute relieved them from those difficulties, by enabling them to avow without naming their tenants: but the fourth section of the act provides that Plaintiffs and Defendants in replevin shall have like pleas and aid-prayers in all avowries, cognizances, and justifications, as if they had been made after the due order of the common law. So the 11 *Geo.* 2. relieves avowants from beginning, by setting out their titles, but it does not preclude Plaintiffs from bringing the title in question by plea, if they think

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think proper. It was holden in *Paramour* v. *Chapman*, *Cro. Jac.* 127. that the Plaintiff in replevin might have all pleas, notwithstanding the statute *H.* 8. which he might have had at the common law, except disclaimer. The second plea is, that the persons under whom the Defendant makes cognizance were not seised within fifty years:—

The Court here observed, that the issue tendered in that plea was, that there was no seisin *in fee* within fifty years, and that if that issue should be found for the Plaintiff, it would be no defence to the demand for rent; for if the Defendant was tenant for life, or tenant in tail, though not seised in fee, he would be entitled to distrain for the rent; that if the Plaintiff had pleaded in bar generally, every question respecting the Defendant's title might have been raised, which could be raised by pleading; that it was immaterial whether the Defendant were seised in fee or not, for if he were only tenant for life, or tenant for years, he might equally be entit ed to the rent; and that supposing the Defendant to be entitled to the rent by several descents, but not seised in fee, it was the express object of the 11 *Geo.* 2. to relieve him from the prolixity of setting forth his title.

Lens then stated, that the claim for rent here set up was made under a title of which the Plaintiff, who was a purchaser, was wholly ignorant, and therefore applied for leave to withdraw the pleas, and plead issuably; which was allowed by the Court.

1804.

June 16th.

EVANS, Assignee of the Sheriff of MIDDLESEX *v.* SURMAN.

Where a judgment against the principal is set aside upon condition that the bail-bond should stand as a security, the bail, if sued upon the bail-bond, are entitled to a rule to plead, and a demand of a plea, before judgment can be signed against them.

THIS was an application to the Court to set aside a judgment in an action upon a bail-bond for irregularity; and the only question was, Whether in a case where a judgment in the principal action had been set aside upon condition that the bail-bond should stand as a security, and the Plaintiff afterwards obtained a verdict against the Defendant in the principal action, and entered up judgment thereon; the bail who had appeared to the action on the bail-bond were entitled to a rule to plead, and a demand of a plea?

Marshall Serjt. shewed cause, and insisted that the bail were not at liberty to plead in a case where they had agreed that the bail-bond should stand as a security; and therefore no rule to plead, or demand of a plea, was necessary.

Best Serjt. *contrà* insisted, that the terms of the rule being that the bail-bond should stand as a security, and not that judgment should be entered up on the bail-bond, the bail were at liberty to plead to the action on the bail-bond and consequently were entitled to a rule to plead, and a demand of a plea, before judgment could be signed.

The Court were of opinion, that this was the true construction of the terms of the rule, that the bail-bond should stand as a security, and therefore made this rule absolute, but without costs, as the officers did not seem quite agreed upon the practice.

1804.

June 8th.

CHARLWOOD *v.* MORGAN *et Ux.*

The Court refused to allow the demandant in a writ of right to amend the mistake of a Christian name in the count, though an affidavit, accounting for the mistake was produced.

Or to discontinue the suit.

THIS was an application to the Court for leave to amend a count in a writ of right. The pedigree was thus stated in the count; "and from the said *Robert*, (the ancestor last seised,) because he died without issue of his body, the right descended to *John Charlwood* as brother and heir of the said *Robert*, and from the said *John*, because he died without issue of his body, the right descended to *James Charlwood*, as brother and heir of the said *Thomas*, and from the said *James* the right descended," *&c. &c.* The tenant demurred specially to this count, and assigned for cause, "that no right was deduced from *John Charlwood* to *James Charlwood*, inasmuch as it was alleged, that from the said *John*, because he died without issue of his body, the right descended to *James Charlwood* as brother and heir of the said *Thomas*, whereas no mention was made before of any person named *Thomas*, from whom the said *James Charlwood* deduced any title."

A rule *nisi* for amending the count was obtained upon an affidavit, which stated that in the count, as originally drawn, the right was stated to have descended from *John Charlwood* to *Thomas Charlwood*, as brother and heir of the said *John*, and from the said *Thomas*, because he died without issue of his body, to *James Charlwood*, as brother and heir of the said *Thomas*; but that it being found advisable, before the count was delivered, to strike out the statement of the descent to *Thomas* altogether, the words "as brother and heir of the said *John*," were by mistake struck out, and the words "as brother and heir of the said *Thomas*," suffered to remain.

Praed Serjt. shewed cause, and contended, 1st, that the Court had no power to make the proposed amendment,

ment, there being nothing by which the amendment could be made, for that the case of a writ of right differed materially from other actions in which a new original may be purchased, or a new bill be filed, by which an amendment may be made. He cited the case of *Harvey* v. *Stokes*, *Com.* 566. where the Court of Common Pleas thought that the mistake of a name in a replication in an action of debt could not be amended, it not being the name either of the Plaintiff or the Defendant. 2dly, he insisted, that even if the Court had a discretionary power to amend, they never would allow an amendment in a writ of right, unless the demandant made out a favourable case by affidavit, (which the present demandant had not done, the affidavit amounting only to a history of his blunder,) and for this he cited *Dumsday* v. *Hughes*, 3 *Bos. & Pull.* 453. He also observed, that in this case the taking the *esplees* having been alleged in the reign of *Geo.* 2, there had been an adverse possession of more than 40 years, and therefore this was not a favourable case for an amendment.

Bayley Serjt. in support of the rule observed, that as the defect in the count was an evident mistake, the Court might in the case of a writ of right as well as in other cases, allow the justices to amend; and that if it were necessary to make out a favourable case, the affidavit produced, which shewed that the defect had arisen from a mere mistake of the pleader, might be considered as having that effect. He admitted, that he had not been able to find any instance of an application to amend in a writ of right, except the case of *Dumsday* v. *Hughes*, but urged that as amendments had been allowed in *formedon* and in criminal cases, there was no reason why they should not be allowed in this proceeding.

Sir JAMES MANSFIELD C. J. Had not this been a proceeding by writ of right, the Court would have been

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willing to amend the mistake which has arisen, and into which the most careful pleader might have fallen. But considering the nature of this proceeding, how much it has always been discouraged, how much tenants have been permitted to avail themselves of every advantage to defeat the claims of demandants, I am of opinion that unless some precedent for such an amendment can be produced, the soundest exercise of our discretion will be not to allow the amendment. Every one knows the consequence of overturning titles which have been supposed to exist for near 60 years. Many great purchasers consider 60 years possession as the best title which can be made, and it has often been lamented by eminent lawyers, that the period has not been shortened, who have thought that 60 years was too long a time for titles to remain *in dubio*.

HEATH J. I am of the same opinion. In *Dumsday* v. *Hughes* we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant. We did not choose to say at that time, that in no case whatever would an amendment be allowed, since a fit case might by possibility be brought before us. The mistake here is only a common mistake, and not such as entitles the demandant to any favour.

ROOKE and CHAMBRE Js. expressed themselves of the same opinion.

Rule discharged.

Bayley then applied for leave to discontinue, which the Court refused, saying, that the same reasons which had been given for refusing the amendment equally applied to any other matter of favour in such a proceeding.

1804.

June 13th.

COPOUS *v.* BLYTON and Another, BAIL.

On the *quarto die post* of the return of the *ca. sa.* against the principal, the bail are fixed, and if after that time they apply to stay proceedings against themselves pending a writ of error, the Court will not grant the application unless they undertake to pay not only the condemnation money, but also the costs of the action against themselves, the costs of the aplication, and where there is no bail in error, the costs of the proceedings in error.

IN this case final judgment having been signed against the principal on the 4th of *May*, a *ca. sa.* issued on the 5th, returnable on the *Morrow of the Ascension*, (10th of *May*) which was returned *non est inventus*. On the 16th a *capias ad respondendum* issued against the bail, returnable on the first return of this term, (1st of *June*) on which day a declaration was delivered conditionally. On the 17th of *May*, a writ of error was sued out in the original action, and allowed on the 18th. On the 5th of *June* a rule *nisi* was obtained for staying proceedings in the action against the bail pending the writ of error, on their undertaking to pay the damages in the original action, or to surrender the principal, if the judgment should be affirmed.

Vaughan Serjt. now shewed cause, and contended, that in point of law the bail was fixed on the *quarto die post* of the return of the *ca. sa.* against the principal, (the 14th of *May*,) though by the indulgence of the Court they are allowed to surrender at any time within four days after the return of the process against themselves; that such surrender however could not be pleaded to an action on the recognizance, which is forfeited on the return of the *ca sa.* and that therefore if the bail apply to be relieved on such surrender, they must undertake to pay not only the condemnation money, but also the costs of the action against the bail, the costs of the application, and, where there is no bail in error, the costs of the proceedings in error. He cited *Buchanan* v. *Alders*, 4 *East*, 546., as a case precisely in point.

Best Serjt. *contrà* insisted, that according to the modern practice, bail were not fixed until the return of the second

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scire facias, or of the *capias ad respondendum*, against the bail: that the writ of error therefore having been allowed several days before the return of the *capias ad respondendum*, the bail were entitled to a stay of proceedings on the terms prayed by the rule; that it appeared from the case cited, that if the writ of error were sued out before the day on which the bail had to surrender the principal *sedente Curia*, it intercepted the fixing of the bail; and that as the time for surrendering the principal is the return of the 2d *scire facias*, that case was decidedly in favour of the application.

Sir JAMES MANSFIELD Ch. J. The question is, whether the bail who apply to the Court for an indulgence are entitled to any thing more than a stay of proceedings on undertaking to pay every thing, if the judgment shall be affirmed. With respect to the bail being fixed, the term "fixed" is somewhat equivocal. There is no doubt that by the indulgence of the Court the bail may surrender the principal at any time before the return of the process against themselves; and so far they are not fixed until that time; but according to the true sense of the expression they are fixed upon the return of the *ca. sa.*; if they were not fixed, they might plead the surrender of the principal to the action on the recognizance. As therefore the bail come after all right to indulgence is at an end, I think the Court ought not to interpose in their favour but on the terms required by the Plaintiff.

Per Curiam, Rule absolute, the bail undertaking to pay the condemnation money, the costs of the action against the bail, of the proceedings in error, and of the application.

1803.

June 18th.

HAMMOND and others, Assignees of GADSDEN, a Bankrupt, *v.* ANDERSON.

TROVER for 130 bales of bacon.—The cause was tried before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Easter* term, when it appeared that Messrs. *Pinnell* and Co. having sold the bacon in question to *James Gadsden* for 798*l.* 7*s.* 8*d.* to be paid for by a bill at two months, on the 5th of *March* last weighed the same, and left an order with the Defendant, at whose wharf the bacon lay, to deliver it to *James Gadsden* or his order; that on the 9th of the same month *Gadsden* weighed the whole of the bacon, and took away 25 bales, leaving the remainder at the Defendant's wharf; that on the 10th, Messrs. *Pinnell* and Co. having heard that *Gadsden* was insolvent, gave an order to the Defendant not to deliver the remainder of the bacon to *Gadsden*, together with an undertaking to indemnify him against the consequences; that *Gadsden* soon after became a bankrupt, and that the Plaintiffs being chosen assignees under his commission, demanded the bacon of the Defendant, who refused to deliver it; that by the custom of the trade, where the goods sold continue to lie at the wharf after the sale, the charges of warehousing are always borne by the vendor for 14 days from the sale, at the expiration of which time, and not before, they are entered in the books of the wharfinger in the name of the vendee. A verdict was found for the Plaintiffs, with liberty to the Defendant to move that a nonsuit might be entered.

A number of bales of bacon then lying at a wharf having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendor, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt, whereupon the vendor within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade the charges of warehousing were to be paid by the vendor for 14 days after the sale. Held that the vendee had taken possession of the whole and that the vendor had no right to stop what remained in the hands of the wharfinger.

Accordingly, a rule *nisi* for entering a nonsuit having been obtained, *Best* and *Praed* Serjts. were this day called upon by the Court to support the rule. Though the property in the goods was completely transferred to the

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the vendee by the sale, yet the possession continued in the vendor. So long as the vendor continued to pay for warehousing, the warehouse must be considered as his own The case therefore stands precisely upon the same grounds as if the vendor had sold the goods lying in his own warehouse, and the vendee after taking away a part had become insolvent; in which case the right of the vendor to retain the remainder would be unquestionable. Before the sale it is clear that the warehouse of the wharfinger was the warehouse of the vendor, and as the vendor by the custom of the trade continued to pay for the warehousing after the sale, there is no reason why it should not still be considered in the same light. This therefore is not a case of stoppage *in transitu*, nor do the decisions upon that subject in which the vendee has put an end to the *transitus* by exercising acts of ownership, apply to this. Nor is it like the case of *Slubey* v. *Heyward*, 2 *H. Bl.* 504. where the delivery of part of a cargo was considered such a delivery of the whole as to prevent the right of stopping *in transitu*, since the ship in that case seems to have been chartered by the consignees themselves; but the present case is more like that of *Northey* v. *Field*, 2 *Esp. N.P. Cas.* 613. where the vendee having neglected to pay the duties upon wines consigned to him, they were lodged in the king's stores for the purpose of being sold, unless the duties and charges of warehouse room, &c. should be paid within three months, and Lord *Kenyon* held, that while the wines continued in the king's stores the right of stopping *in transitu* remained.

Sir JAMES MANSFIELD C.J. (stopping *Shepherd* Serjt.) The right of stopping *in transitu* is a favourable right which the courts of law are always disposed to assist. But I do not know how to distinguish this from the case before decided in this Court. The whole quantity of bacon

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bacon was sold at one price by a bill payable at two months, and an order given to deliver it. On the 9th of *March* the whole was weighed and twenty-five bales sent away: the rest remained at the wharf and in the custody of the Defendant. So much having been taken away, and the whole weighed by the bankrupt, it is insisted that the bankrupt had taken possession of the whole. It is not disputed that the whole became the property of the bankrupt at the time when the order was given. But it appears that by the custom of the trade the vendor gives a sort of indulgence to the vendee, by continuing to pay the warehouse room for 14 days after the sale. Except in this respect, however, the vendor has no more concern with the goods sold than a stranger. The question is, Whether it be not too late for the vendor to claim any part of the goods on account of the bankruptcy of the vendee? As to those bales which were sent away, the bankrupt had taken actual possession, and therefore no question can arise; and when it is admitted that he had taken possession of a part, how can it be said that he had not taken possession of the whole? The price was entire; and the whole to be paid for by one bill. On a former occasion this Court decided that, where a part of the goods sold by an entire contract was taken possession of, the vendee had taken possession of the whole. However equitable therefore the claim of the vendor may be in this case it appears to me that he was too late to take advantage of it. It is of greater consequence that the law should be as uniform as possible, than that the equitable claims of an individual should be attended to; and as I cannot distinguish this case from that which was before decided in this court, I think that the verdict must stand.

HEATH J. I am of the same opinion. Though the goods continued in the warehouse of the Defendant after

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the sale, they were no longer in the possession of the vendor for any purpose whatsoever. The jury was of opinion that the payment of warehouse-room by the vendor was a mere indulgence given to the vendee. The contract being entire, and part having been taken away, the privilege of stopping *in transitu* could not attach.

ROOKE J. The facts of this case are too strong to be got over. The whole of the goods was paid for by one bill; a general order was given for the delivery of the whole, and the purchaser under that order went and took away a part; how could he more effectually change the possession.

CHAMBRE J. The privilege of stopping *in transitu* appears to me to have been carried far enough. It certainly creates an inequality among the creditors, by giving a preference to one over the rest. However, I have no objection to the privilege itself, provided it be confined within proper bounds. But was there not here a complete delivery of the goods? The payment of the warehouse-room by the vendor cannot make a difference. The vendor of course charges just so much more as will pay the expence of the warehouse-room. If the expence had been paid by the vendee, it would not make a delivery at the wharf a delivery to him. Nor can the vendor avail himself of the circumstance of the expences being paid by him to prevent a delivery to the vendee from operating as such. This is a much stronger case than that of *Slubey* v. *Hayward*, which proceeded upon the principle that a delivery of part where the contract was entire was a delivery of the whole But here there was an actual delivery of the whole. There the person who made the delivery, delivered a part only out of the ship. But here the bankrupt had actual manual possession of every articles

ticle, and having weighed them all he took upon himself to separate them. It seems to me therefore to be perfectly clear that the original vendor had no claim, and that the verdict is right.

Rule discharged.

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FLINT *v.* BRANDON.

June 18th.

Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10*s.* *per* load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of *A. B.* By indorsement made on the lease before execution, it was agreed that it should be lawful for the lessor to let any part of the within demised premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre which he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel any part of the within demised premises, he covenanting to pay to the lessor 20*l.* for every acre he should break up and dig at or before the expiration of the time, and to make good the same. Held that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease, without making them good.

THIS was an action of covenant. The declaration stated, that by indenture of the 29th of *July* 1789, the Defendant demised to the Plaintiff certain premises to hold from the 29th of *September* 1799 (being the day on which a lease granted to *Thomas Clutton* therein mentioned would expire) for 21 years; nevertheless the same to be put into the possession of the Plaintiff in the same state and condition as it was expressly covenanted, declared, and agreed to be yielded up by the said *Thomas Clutton*, his executors, *&c.* unto the original landlord thereof, his heirs or assigns, in and by the said lease granted to the said *Thomas Clutton*; that the Defendant covenanted that the Plaintiff, at the expiration of the lease to *Clutton*, should be put into possession of the demised premises, and that the premises should then be in the same state and condition as *Thomas Clutton* did, in and by his said lease, covenant with the original landlord to leave and yield up the said premises. The declaration then averred, that on the 8th of *June* 1779, by a memorandum in writing between the said *Thomas Clutton* and one *Henry Penton* (the original landlord) it was agreed,

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that it might be lawful for the said *Thomas Clutton*, his executors, *&c.* to break up and dig for gravel any part or parcel of the said demised land, he the said *Thomas Clutton* thereby covenanting for himself, his executors, *&c.* to make good the same at or before the expiration of the said lease to him, which was the covenant and agreement of the said *Thomas Clutton* referred to by the said covenant of the Defendant; that the premises at the expiration of the lease to *Thomas Clutton*, were not in the same state and condition as the said *Thomas Clutton* had agreed to put them in, but, on the contrary thereof, divers pits and holes made by *Thomas Clutton*, by virtue of the said memorandum, were unfilled, unlevelled, and not made good. The second count stated the covenant in the lease from *Penton* to *Thomas Clutton*, thus: "That it might be lawful for the said *Thomas Clutton*, his executors, *&c.* to break up and dig for gravel any part or parcel of the said demised premises, the said *Thomas Clutton* thereby covenanting for himself, his heirs, *&c.* to pay to the said *Henry Penton*, his heirs, *&c.* the sum of 20*l.* for every acre he or they should so break up or dig, and to make good the same at or before the expiration of the deed to him;" the breach was the same as in the first count. The Defendant, as to the first count, pleaded, that the deed of the 29th of *July* 1789 was not his deed; 2dly, that it was not agreed between *Henry Penton* and *Thomas Clutton*, in manner and form as the Plaintiff alleged; and he pleaded two similar pleas to the second count. On all these pleas issues were joined.

The cause was tried before Sir *James Mansfield* Ch. J. at the *Westminster* sittings after *Easter* term, and a verdict was found for the Plaintiff with 1000*l.* damages. In this term a rule *nisi* for a new trial was granted. Upon the production of the deeds in Court, it appeared that the lease from *Penton* to *Clutton* contained a covenant on the

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the part of *Clutton*, his executors, &c. "that he or they would not dig or cause to be dug any gravel, brick-earth, sand, or clay, out of any part of the premises thereby demised, without the consent of the said *Henry Penton*, his heirs, &c. or paying unto him or them the sum of 10*s.* for every load, *except what should be dug out of two acres*, part of the premises thereby demised, part of a garden late in the possession of *Edward Cole*;" that upon the said lease was indorsed a memorandum, whereby it was mutually agreed between the said *Henry Penton* and *Thomas Clutton*, "that it should and might be lawful to and for the said *Henry Penton*, his executors, &c. to let or set to any person or persons whomsoever, for the purpose of making bricks or tiles only, any part or parts of the within-mentioned forty-three acres and two roods of land within demised to the said *Thomas Clutton*, he the said *Henry Penton*, his heirs, &c. allowing the said *Thomas Clutton*, his executors, &c. the sum of three pounds for every acre he or they should let or set as aforesaid. And it was likewise further agreed, by and between the said parties, that it should and might be lawful to and for the said *Thomas Clutton*, his executors, &c. to break up and dig for gravel any part or parcel of the within demised land, he, the said *Thomas Clutton* thereby covenanting for himself, his executors, &c. to pay to the said *Henry Penton*, his heirs, &c. the sum of 20*l.* for every acre he or they should so break up and dig, and to make good the same at or before the expiration of the within lease;" and it was stated, upon affidavit, that at the trial the attention of the court was not called to the exception in the original lease, and that the verdict proceeded entirely upon the memorandum indorsed, it not being then known that any part of the land demised to the Plaintiff formed a part of the land exempted in the lease, and that one acre of the land demised to the Plaintiff was in fact part of the two acres so excepted.

Shepherd

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Shepherd Serjt. shewed cause, and contended that the covenant in the lease from *Penton* to *Clutton*, as far as respected gravel, was done away by the memorandum indorsed upon that lease; and that although the covenant in the lease contained an exception of two acres, yet that the memorandum was general, and applied to all the premises, *Clutton* agreeing to pay 20*l.* for every acre which he should dig for gravel, and to make good the same.

The Court here intimated, that the exception of the two acres in the lease could not have the effect which had been attributed to it by the Defendant, of giving a power to the lessee to dig for gravel in those two acres, without being obliged to make the ground good.

Best and *Praed* Serjts. for the Defendant, contended that according to the true construction of the covenant in the lease the lessee was entitled to dig for gravel in the two excepted acres, without the consent of the lessor or any obligation to pay for so doing; and that if such was the true construction of the covenant it was not to be supposed that the lessee intended to agree by the memorandum to pay 20*l.* *per* acre for digging in that part of the premises where he had a right to dig for nothing, or to lay himself under any obligation to make the ground good in those places.

Sir JAMES MANSFIELD Ch. J. Notwithstanding the inaccuracy of the expressions in the lease and memorandum, it is not very difficult to ascertain what was really intended by the parties. By the lease several parcels of land are demised in a part of the country where land is very valuable; and in order to avoid having any disputes respecting waste committed upon the land left to be decided by the ordinary rules of law, the covenant in

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in question as to gravel, sand, clay, &c. is inserted. The first question arises on the exception contained in that covenant. On behalf of the Defendant it is insisted, that it gives a power to the lessee to dig in the two excepted acres to an indefinite depth, and totally to ruin those two acres, without being obliged to make any compensation to the lessor. If indeed such a power had been expressly given, the lessee must have had the benefit of it; but it is very improbable that the lessor should have intended to give it, and the Court will never put such a construction on a lease as to invest a lessee with a right of that extensive nature, unless the words are so clear as not to admit of restriction. In this case, however, they are so far from clear that the exception does not apply to the first part of the restraint, that is, to the digging without licence, but only to the payment of ten shillings *per* load. The truth seems to be this; that the person who drew the lease thought it might be worth while for the lessee to give ten shillings *per* load rather than not dig at all, but he was not to be permitted to do so in the two acres which were garden ground, at any price. It was natural to make the restriction respecting the garden ground rather tighter than that which applied to the rest of the land. This being the nature of the lease, the parties before the execution of it agree by a memorandum that it shall be lawful for *Penton* the lessor to let off any part of the premises to make bricks or tiles, he allowing to *Clutton* 3*l.* *per* acre for every acre which he should so let. This permission to the lessor applies to every part of the premises, and certainly includes the two acres to which the exception in the lease applies. Can it then be supposed that if *Clutton* by the lease had liberty to dig to the centre in those two acres without making compensation, he would have put it in the power of his lessor to take that right from him for 3*l.* *per* acre. This decisively shews

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shews either that it was not the original meaning of the parties to give such a right to the lessee, or that it was intended to be done away by the memorandum. It is then further agreed that *Clutton* may dig for gravel in any part of the within demised land, he covenanting to pay 20*l. per* acre for every acre which he shall so break up, and to make it good. These words are as general as those by which the lessor is empowered to let. And can it be supposed that if the lessee had a right by the lease to dig gravel in the two acres in question for nothing, he would have covenanted in such general words, and would not have introduced an exception as to these two acres. It seems to me, therefore, that according to the true and only rational construction the memorandum amounted to a perfectly new agreement as to digging sand, gravel, *&c.* and that there is no pretence for setting up an exception as to any part of the ground. As to the exception itself it is part of the covenant of the lease, which, if doubtful, must be taken most strongly against the covenantor. It is not necessary to determine what would have been the effect of the Defendant's covenant if the lease and memorandum between *Penton* and *Clutton* could have been construed in a different manner from that which I have stated. But as the memorandum only speaks of making the ground good, and that memorandum is in general terms, there might have been strong ground to contend that the Plaintiff was only bound to look at that part of the agreement between *Penton* and *Clutton* which related to the subject of making the ground good. On this point, however, it is unnecessary to give any opinion, since by the construction which I have given to the lease and memorandum taken together the covenant of *Clutton*, to make the ground good, applies to all the premises demised.

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HEATH J. In an instrument so obscurely worded it may be difficult to find the meaning of the parties with certainty. But we must proceed to construe according to the principles of law and the rules of grammar. By the common law the lessee was not entitled to dig. It was therefore necessary to give him a power to do so. But in the lease no such power is given respecting the two excepted acres, for such a power could not be given by way of exception. Then, as to the memorandum, it is an agreement between both parties, by which each was to receive some advantage not given by the lease. The lessor was to have the liberty of letting the land to make bricks on paying 3*l. per* acre only, and the lessee as a compensation for this, instead of paying 10*s. per* load for every load of gravel dug, &c. was to pay 20*l. per* acre for every acre which he should break up, and to make it good. This new agreement is in general terms, and therefore extends to every part of the land demised.

ROOKE J. I am of the same opinion.

CHAMBRE J. I am entirely of the same opinion. The covenant on which the action is brought clearly refers t the memorandum, and the construction which has been adopted appears to me to be the only safe line to pursue. Had the covenant in the lease to *Clutton* been clear in its own terms, and could it have stood consistently with the memorandum, there might perhaps have been more difficulty, and we must have endeavoured to put such a construction on all the parts as to make them consistent with each other. But here the memorandum is quite a new agreement.

Rule discharged.

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June 18th.

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To a plea of a coverture the Plaintiff replied, that the Defendant's husband "lived and resided in parts beyond the seas, viz. in *Ireland*, and that the Defendant lived in this kingdom, separate and apart from her husband, as a single woman; and as such single woman, promised," &c. Held bad upon a general demurrer.

INDEBITATUS assumpsit for the use and occupation of certain ready furnished lodgings; and also for money paid, money had and received; and on an account stated. Plea, that the Defendant, at the time of making the promises, &c. was, and yet is, the wife of the Rev. *Samuel Little*, D.D. which said *S. L.* is now living, to wit, at the parish aforesaid, in the county aforesaid, and this, &c. wherefore, &c. Replication that before and at the time of the making of the said several promises and undertakings in the said declaration mentioned, and continually from thence hitherto the said *S. L.* in the said plea mentioned lived and resided in parts beyond the seas, that is to say, in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*; and that during all that time the said Defendant lived in this kingdom separate and apart from the said *S. L.* as a single woman, and that the said Defendant made the said several promises and undertakings in the said declaration mentioned as such single woman, to wit, at, &c. To this there was a general demurrer and joinder therein.

Best Serjt. was called upon to support the replication. It may be admitted that a mere temporary absence of the husband from this country will not make the wife liable for debts contracted by her; but the averment in this replication that the husband lived and resided in *Ireland* at least calls upon the Defendant to shew that the absence of the husband was merely temporary. Besides, the replication avers that the Defendant lived separate and apart from her husband as a single woman, which shews that she was not separated from him for a time only, but had assumed a character different from that which she would

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would have derived from him while she lived as his wife. The case of *De Gaillon* v. *L'Aigle*, 1 *Bos. and Pull.* 357. is precisely in point; the replication there was in terms the same as this; for the averment that the Defendant carried on the business of a merchant as a single woman could make no difference, as the trade was not carried on within the city of *London*. The case of *Walford* v. *The Duchesse de Pienne*, 2 *Esp. N. P. Cas.* 554. is also a strong authority for the Plaintiff, in which case Lord *Kenyon* intimated that the principle of the old common law, where the husband had abjured the realm, applied to a case in which the husband had left the kingdom for four years.

Sir JAMES MANSFIELD Ch. J. The terms of the replication are perfectly consistent with a mere temporary absence. They might be applied to the case of every man who goes for a short time to live in *Ireland* or *Scotland*, and whose wife in the mean time contracts debts here.

HEATH J. The case of *De Gaillon*, v. *L'Aigle* proceeded much upon the ground of the Defendant's husband being a foreigner.

Judgment for the Defendant.

Sellon Serjt. was to have argued in support of the demurrer.

1801.

ISAAC GARLAND and ELIZABETH his Wife, JOHN CORRY and ANN his Wife, and THOMAS TOMKINS, *v.* REES THOMAS, JAMES LEACH, ROBERT LEACH, FRANCIS WOODFORDE, and RICHARD MESSITER.

Devise to the use and behoof of the testator's niece *S. C.* and his two nieces *E. G.* and *A. C.* and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint tenants. Held that under this devise *S. C.* *E. G.* and *A. C.* took as tenants in common.

THE following case was sent by the Master of the Rolls for the opinion of this Court.

Robert Clarke gentleman, being seised of, and entitled to, certain freehold estates at *Lavington* in the county of *Somerset*, by his will duly executed and attested for devising real estates, bearing date the 5th day of *March* 1789, gave and devised unto the Defendants *Rees Thomas* and *James Leach* (and one *Henry Pain*, since deceased) all those his freehold farms, lands, tenements, and hereditaments, with their appurtenances, at *Lavington* aforesaid, to hold to them the said *Rees Thomas*, *James Leach*, and *Henry Pain*, their heirs and assigns, upon trust as to one undivided moiety or half part thereof, the whole into two equal parts to be divided, to the use of his the said testator's nephew *Richard Clarke*, for life, without impeachment of waste; remainder to the said trustees and their heirs to preserve contingent remainders; remainder to the use and behoof of the first son of the body of his said nephew *Richard Clarke*, lawfully begotten, in tail; remainder to the use and behoof of the second, third, fourth, fifth, sixth, seventh, and every son and sons of the body of his said nephew *Richard Clarke*, lawfully begotten, severally and successively, in tail; remainder to the use and behoof of all and every the daughter or daughters of the body of the said testator's nephew *Richard Clarke*, lawfully begotten, in tail; and for want of such issue, *to the use and behoof of his the said testator's niece* Susannah Clarke, *and his two nieces*, *the*

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the Plaintiffs, Elizabeth Garland *(by her then name of* Elizabeth Fountain), *and* Ann Corry *) by her then name of* Ann Fountain) *and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint tenants; and for want of such issue, remainder over*, and upon trust, as to the other moiety or half part of and in the said hereditaments and premises, the whole into two equal parts to be divided, to the use of his the said testator's said niece *Susannah Clarke*, and her assigns, for life, without impeachment of waste; remainder to the said trustees to preserve contingent remainders; remainder to the first and every other son of the body of his said niece *Susannah Clarke*, lawfully begotten, in tail; remainder to the use and behoof of the first, second, third, fourth, fifth, sixth, seventh, and all and every other the son and sons of the body of his said niece *Susannah Clarke*, lawfully begotten, severally and successively, in tail; remainder to all and every the daughter and daughters of the body of the said *Susannah Clarke*, lawfully begotten, in tail; *and for want of such issue to the use of his the said testator's nephew* Richard Clarke, *and his said two nieces the Plaintiffs*, Elizabeth Garland *and* Ann Corry, *and the survivors of them, and the heirs of the body of such survivor, as tenants in common, and not as joint tenants; and for want of such issue remainder over.* The devisor died seised, without having revoked or altered his said will, leaving said *Richard Clarke*, his nephew and heir at law, and said *Susannah Clarke* him surviving. The said testator's nephew *Richard Clarke*, entered upon and took possession of the moiety of the said estate and premises at *Lavington*, so devised to him for his life as aforesaid, and died without issue, leaving the said *Susannah Clarke* and the said Plaintiffs, him surviving. The said *Susannah Clarke*

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entered upon and took possession of the moiety of the said estate at *Lavington* so devised to her for her life, as aforesaid, and afterwards intermarried with the said Defendant *James Leach*, and she and the said *James Leach*, in her right, continued in the possession thereof until the death of the said *Susannah*; after the death of the said *Richard Clarke* the said *Susannah Leach* (formerly *Clarke*) and the Plaintiffs *Elizabeth* and *Ann*, entered upon and took possession of the moiety of the said estate at *Lavington*, so demised to them, and continued in the possession thereof until the death of the said *Susannah Clarke*, who died in *September* 1800, leaving the Defendant *Robert Leach* her eldest son and heir at law, and the Plaintiffs *Elizabeth* and *Ann*, her surviving.

The question for the opinion of the Court was, What interest the Defendant *Robert Leach* and the Plaintiffs *Elizabeth Garland* and *Ann Corry* took under the will of the testator *Robert Leach*, in the estate at *Lavington* in the county of *Somerset*?

Best Serjt. for the Plaintiffs. The question in this case arises upon the words "to the use and behoof of his the testator's niece *S. Clarke*, and his two nieces *Elizabeth Garland* and *Ann Corry*, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint tenants." While *S. Clarke* was living, the three nieces held as joint tenants; but on the death of *S. Clarke*, the two survivors became tenants in common in fee of her share. Had the former words of the devise stood alone and uncontrolled by the expression "as tenants in common, and not as joint tenants," no man could have doubted that the estate given was an estate in joint-tenancy. If, however, the effect contended for by the Defendants be given to these latter words, then the words "survivor and survivors,

vivors, and the heirs of the body of such survivor," must be altogether excluded and rejected. But if they can stand consistently with that interpretation which I put upon the devise, they ought not to be excluded and rejected. The words as "tenants in common, and not as joint tenants," do not relate to the original devisees, but to the heirs of the body of such devisees, and this construction will square with the rule of applying the relative to the last antecedent. In *Haws* v. *Haws*, 3 *Atk.* 524. the devise was to the testator's four children, "their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, with the benefit of survivorship." It was contended that the last words referred only to a benefit of survivorship to the survivors of the children, if one or more died in the life-time of the testator; but Lord *Hardwicke* said, "this is too nice a construction, for it is more natural to suppose that a man intends the children of his children should be provided for than not, and the Court supposes a parent is taking care of the posterity of his childeen." In *Armstrong* v. *Eldridge*, 3 *Bro. Ch. Cas.* 215. the devise was to several, equally between them, share and share alike," for their lives, and "after the decease of the survivor of them," upon trust. There the latter words were held to create a joint-tenancy, notwithstanding the former words, the Lord Chancellor observing, "that though the words, equally to be divided, and share and share alike, were in general construed in a will to create a tenancy in common, yet where the context shews a joint-tenancy to be intended, the words should be construed accordingly." Now the words creating the joint-tenancy in that case, were less strong than those which point to the same estate in this. Again, in *Barker* v. *Giles*, 2 *P. Wms.* 280. a devise of lands to two, and "the survivor and survivors of them, and their

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heirs and assigns for ever, equally to be divided between them, share and share alike," was held to create a joint-tenancy in the two for life, with several inheritances. In that case Lord Chancellor *King* said, "it is a certain rule in the exposition of wills especially, that every word shall have its effect, and not be rejected, if any construction can be put upon it." In *Tuckerman* v. *Jefferies* (cited in *Marryat* v. *Townley*, 1 *Vez.* 103.) the devise was of all the testator's estate to two nieces *E.* and *I.* to be equally divided between them, and from and after their decease to the right heirs of *I.*; *Holt* Ch. J. held it a joint tenancy, during their lives; and in 2 *Roll. Abr.* 90. *pl.* 5. a devise to two "equally to be divided between them, to have and to hold, to them and to the survivor of them, and to the heirs of the body of the survivor," was resolved to create a joint tenancy. If the first takers under this will are adjudged to have a tenancy in common, the words respecting survivorship must be altogether excluded, and consequences totally different from those which would ensue, if full effect was given to them, must follow. The judgment in *Lord Bindon* v. *Lord Suffolk*, 1 *P. Wms.* 96. which is an authority the other way, was reversed in the House of Lords. [Sir *James Mansfield* Ch. J. observed, that the decision of Lord Chancellor *Cowper* in that case had always been treated as the right decision, and particularly in the case of *Roebuck* v. *Dean*, 2 *Vez. Jun.* 265.] If the words in this devise, which create a joint-tenancy, cannot stand consistently with those which create a tenancy in common, it will be for the Court to decide which shall be rejected.

Lens Serjt. *contra.* In construing this devise the Court must be driven to the necessity of excluding some of the words used by the testator from taking effect; in so doing the reason of the thing, as well as the rules laid down in

in similar cases, must induce them to exclude those words which interfere with the creation of a tenancy in common in the devisees. *Haws* v. *Haws* supports this construction of the will; and though Lord *Hardwicke* in that case (as it is reported in 1 *Vez.* 14.) expressed his disapprobation of the construction that the words of survivorship there used meant a surviving the testator, yet he admitted it might be resorted to, if no other reasonable construction could be found. Those who argue on behalf of the Plaintiffs wish to destroy the words "tenants in common," or to apply them in such fanciful way as best suits their purpose. *Lord Bindon* v. *Lord Suffolk* has always been acted upon without reserve, and Lord *Hardwicke*, in *Haws* v. *Haws*, considers it as deciding the point then before him. It is also referred to, as authoritative, by Lord *Alvanley*, then Master of the Rolls, in *Russell* v. *Long* 4 *Vez. jun.* 551. He there said, "if no other sense can be put upon the words except survivorship at the death of the testator, that must be the construction." In *Russell* v. *Long* the words used were, "share and share alike;" here the express term "tenants in common" is used. The case of *Maberley* v. *Strode*, 3 *Vez. Jun.* 454. is to the same effect. Nor is the construction for which the Defendants contend at all affected by the case of *Barker* v. *Giles*, which was a devise to two persons, and the survivor or survivors, and their heirs; because the devise being to two persons only, all the words might be satisfied by holding them joint-tenants for life. The same observation applies to the case of *Armstrong* v. *Eldridge*. The case of *Rose* d. *Vere* v. *Hill*, 3 *Bur.* 1881. is an authority precisely in point to support the construction for which the Defendants contend. There the devise was to five, "and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as

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tenants in common, and not as joint tenants;" which words were held to create a tenancy in common in fee. The cases of *Stringer* v. *Phillips*, 1 *Eq. Cas. Ab.* 291. and *Stones* v. *Heurtley*, 1 *Vez.* 165. support the same doctrine. In the latter of these cases Lord *Hardwicke* cites *Blisset* v. *Cranwell*, 3 *Lev.* 373., 1 *Salk.* 226. and adopts a mode of reasoning directly the reverse of what he has been supposed to have held in *Haws* v. *Haws*. If his opinion therefore is to govern the present case, that opinion is with the Defendants. At all events, the words creating a tenancy in common in this will are so express that they cannot be done away by any reasoning or explanation whatever.

Sir JAMES MANSFIELD Ch. J. As this case comes from the Court of Chancery, this Court is only called upon to certify its opinion to the Master of the Rolls; but it may not be amiss to notice shortly the substance of the will, and to state the grounds upon which we hold that *Robert Leach* the son of *Susannah Clarke*, is entitled to one-third of one moiety of the estate on which the question arises. Reading this will, and looking at the consequences of the devise in question, I should have felt great difficulty in adopting any other construction than that which the Court now adopt, even if no similar case had ever been decided. The construction contended for by the Plaintiffs is, that by virtue of the devise *Elizabeth Garland* and *Ann Corry* having survived *Susannah Clarke*, they as such survivors take the whole estate to themselves in the manner given by the will. Now the first consequence of this construction would be, that if *S. Clarke* died leaving children, her children would be excluded; and the next, that supposing *Elizabeth Garland* and *Ann Corry* should die without issue, then the issue of *S. Clarke* being excluded, the estate would go over, though it was not intended

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tended to go over till failure of issue of all. What a very capricious distribution would this have been? The testator intended that his three nieces should be equally benefited in the event of *R. Clarke* dying without sons or daughters; and nothing more absurd could be imputed to him, than the intention that the death of one of his nieces before the other should strip the children of the niece so dying of all benefit under the will. Before we impute such an intention to him, we ought to see it so clearly expressed as not to admit of a doubt. But when we examine the words of the will, we find such intention excluded. Having given the estate to his three nieces, he adds, "and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants." If the words "tenants in common" are to be referred to the whole devise, there is an end of the question: but if that be not the case, did he mean that they should apply to the heirs of the body of the survivor, or the heirs of the body of the survivors? For he could not mean they should apply to both, since it is impossible the heirs of the survivor should ever take, if the heirs of the survivors had already taken in that way. When the testator was giving his estate to his three nieces, he meant them all to take equally, and probably he reasoned with himself, that possibly one or two of his nieces might die in his lifetime, in which case the survivor or survivors were to take the whole. It is true, that in this way of putting the case that consequence will follow, which can only be attributed to the testator's ignorance or forgetfulness, *viz.* that the children of his niece or nieces (should they have any) dying in his lifetime, would be deprived of their mother's share. But notwithstanding this possible consequence which would be attended with hardship, I think that construction must prevail which is the only sound

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sound and rational construction. This I should have thought if I had not read any of the cases upon the subject; and perhaps in forming my opinion my mind may have been affected by the mode of construction which has hitherto prevailed. Now what are the authorities? It is admitted that the case of *Rose v. Hill* is not distinguishable from this, and, indeed, never were two cases more precisely similar to each other. By whom was the case of *Rose* v. *Hill* decided? By Lord *Mansfield*, Mr. Justice *Wilmot*, and Mr. Justice *Yates*; the two former of whom having been in the constant habit of attending the Court of Chancery, their attention must often have been called to the case of *Lord Bindon* v. *Lord Suffolk*. It has been argued that the case of *Lord Bindon* v. *Lord Suffolk* was reversed in the House of Lords; but I think that decision right, and it has been supported by the subsequent authorities referred to in Mr. *Coxe's P. Wms.*, particularly the case of *Stringer* v. *Phillips*. It is true that the latter words might be limited to the heirs of the body of the survivor or survivors, and so not extend to the first taker. But there does not appear to me any difference between this case and that of *Stringer* v. *Phillips*, except that in the present instance an express tenancy in common is created, whereas in *Stringer* v. *Phillips* the words were, "equally to be divided between them," which are usually held to create a tenancy in common. I do not think any of the cases cited for the Plaintiffs apply to this case. In the case of *Armstrong* v. *Eldridge* the testator, after directing the trustees to pay the proceeds of an estate equally, between his grand-daughters for their lives, says, and after the decease of the survivor of them, in trust, to pay to and amongst all the children of the devisees. Now whatever might be the meaning of the former words of the devise, it was quite impossible to say that the testator meant that the children of

of his grand-daughter should receive any thing until all his grand-daughters were dead; for the limitation to the children is not to take place until after the decease of the survivor of the first devisees. The case of *Barker* v. *Giles* turned on the meaning of the word "survivor," to which Lord Chancellor *King* could not give effect without making it a joint-tenancy. In the case of *Tuckerman* v. *Jefferies*, there was a remainder limited after the death of the survivor of the first devisees, which therefore could not take effect until both were dead. The case in 2 *Roll. Abr.* 90. has already received an answer from my brother *Lens*. The words of the present case make it impossible to put any other construction upon the will than that which we have adopted. The case of *Roebuck* v. *Deane*, together with the others referred to in the argument, which followed that of *Stringer* v. *Phillips*, all plainly shew that in a demise of personal estate the plain sense of which is to give a tenancy in common, the word survivorship must be taken to mean a survivorship at the death of the testator. On these grounds, therefore, we shall certify our opinion to the Court of Chancery, that *Robert Leach* took an estate tail in one third of a moiety of the premises in question.

ROOKE and CHAMBRE Js. expressed themselves of the same opinion.

The following certificate was afterwards sent to the Master of the Rolls:

This case has been argued before us by counsel, and we are of opinion, that under the will of the testator *Robert Clarke*, the Defendant *Robert Leach* took an estate in tail general in that part of the estate at *Lavington* which was devised, in the first instance, to the use of his mother *Susannah Clarke*, afterwards *Leach*, for her life; and

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and that the said Defendant *Robert Leach*, and the Plaintiffs *Elizabeth Garland* and *Ann Corry* took a like estate tail in the other moiety of the estate, in equal shares, as tenants in common.

J. MANSFIELD.
G. ROOKE.
A. CHAMBRE.

(AT THE OLD BAILEY.)

April 14th, 1804.

The KING *v.* SARAH WYLIE and Another.

Upon an indictment for disposing of and putting away a forged Bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery.

THIS was an indictment against the prisoners for disposing of and putting away a forged Bank note for one pound, knowing the same to be forged.

It having been proved that the prisoners put off the note stated in the indictment at the shop of one *John Hind*, and that the same was forged; the counsel for the prosecution, in order to shew that the prisoners knew the note to be forged, offered to prove that the prisoners had before passed other forged notes to other persons.

Knapp and *Alley*, for the prisoners, objected to the admissibility of the evidence: they urged, that no evidence could be given of any transaction not stated in the indictment, since the prisoners could not be prepared to defend themselves against a charge of which they had no notice. That it was never allowed upon indictments for burglary or robbery, to prove offences previously committed by the prisoner, in order to show *quo animo* the act was done; nor was such evidence ever admitted upon an indictment for uttering bad money, which was very analogous to the present. That if this evidence was admitted

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admitted upon an indictment for uttering forged Bank notes, it would be an exception to the general law of evidence; and that, at all events, the prisoners ought to have received notice of the several utterings intended to be proved against them, as in the case of barratry, where upon a general indictment against one as a common barrator, the prosecutor is required to give notice of the particular facts intended to be proved. That introducing other transactions tended to confound prisoners in their defence; and that in indictments for misdemeanors, if several misdemeanors were charged in one indictment, it had been usual for the Judges to quash the indictment.

Garrow, *Fielding*, *Giles*, and *Bosanquet*, for the Crown, were stopped by the Court.

Lord ELLENBOROUGH Ch. J. Certainly no different rule of law can prevail with respect to prosecutions by the Bank from those commenced by any other person. This point, however, is not new; it was reserved in the case of *The King* v. *Tattersall*, which was tried at *Lancaster* in 1801 by Mr. J. *Chambre*, and received the collective voice of the Judges. The question was, Whether in giving evidence to prove an allegation that the party uttered a Bank note knowing it to be forged, the prosecutor might give the conduct of the prisoner in evidence, to shew his knowledge of the forgery? The learned Judge reserved the question, Whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another? The opinion of the Judges was, that the jury were at liberty to make such inference. The prisoner does not come unprepared; it is alleged that he uttered a note, knowing it to be forged. Are we then to exclude all evidence but what is furnished by

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by this particular transaction, since without other evidence it is impossible to ascertain whether the party uttered the note with knowledge or under circumstances which shewed the uttering to be venial? I remember a case in which a person came to *Manchester* with a large parcel of forged notes; his whole demeanor afforded pregnant evidence of the mind and purpose for which he came; and a question was made whether that evidence should be received; for it was said, that it would be trying the prisoner for other utterings. But if crimes do so intermix, the Court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected that the Court went through the history of the three different burglaries. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, Whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing. Under the authority, therefore, of the decision, which has already taken place, I think that it is competent to us to go into and receive evidence of another offence, and of the demeanor of the prisoners on other occasions, from which knowledge may be inferred. If the evidence do not furnish sufficient grounds to warrant a conclusion of knowledge, it will be laid out of the question. With respect to joining several misdemeanors in one indictment, it has been matter of discretion in the Judges to quash indictments so framed; for they are not erroneons on the record.

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HEATH J. I am of the same opinion. This objection has been already taken and over-ruled. It is true that a prisoner shall not be punished for offences for which he is not charged. In an indictment for barratry notice must be given of the facts intended to be proved, and the Judges, in their discretion, will defer the trial till such notice has been given; but there can be no demurrer. The Judges have thought that the prisoner ought to be apprised of the facts to be proved against him; for in barratry he would be punished for all the offences proved. In this case the question relates merely to the knowledge of the prisoners: God only knows the hearts of man; and as the intention does not appear from the transaction itself, it must be proved from other facts and circumstances. I remember a case where several persons were tried for a conspiracy to raise wages, and evidence was received of circumstances amounting to substantive felonies, such circumstances being material to the point in issue.

THOMPSON B. I am of the same opinion. The case already decided is in point. Some allusion has been made to the case of uttering bad money; but I by no means agree that the prosecutor cannot give evidence of another uttering on the same day, in order to prove the knowledge. The Court indeed cannot inflict a heavier punishment on account of such other uttering, because it is not charged in the indictment; but it would be evidence that the prisoner knew the money uttered to be bad. Suppose a man utters one bad shilling and fifty more are found upon him, if that be stated in the indictment, it will make him a common utterer; but if it be not alleged, still it may be given in evidence to prove knowledge.

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The evidence having been accordingly received, the prisoners were both found guilty.

July 5th.

The KING *v.* JOHN PALMER and SARAH HUDSON.

If *A.* deliver to *B.* a forged Bank note to be put off by the latter, this is a "disposing of and putting away" by *A.* within the 15 *Geo.* 2. *c.* 13. *s.* 11.

THE prisoners were indicted for feloniously disposing of and putting away a forged Bank note for 2*l.* knowing the same to be forged; and also for feloniously uttering, and publishing as true a forged promissory note for 2*l.* knowing the same to be forged.

At the trial at the *Old Bailey* at the *February* sessions, before *Le Blanc* J. it appeared that the prisoner *Palmer* had been in the habit of putting off forged Bank notes, and had employed the prisoner *Hudson* in putting them off; that on the 21st *January* the prisoner *Palmer* being at the *Rose* public-house in the *Old Bailey*, sent out the prisoner *Hudson* with the forged note stated in the indictment, for the purpose of passing it; that *Hudson* accordingly went to the shop of one *John Shaw* in *Newgate-Street*, and there purchased two muslin handkerchiefs, amounting to 6*s.* in payment, for which she tendered the note in question; that the note being suspected was stopped, and upon examination appeared to be forged. That the two prisoners, upon the evening of the same day, went to the shop of *John Shaw*, when *Palmer* said, "This woman has been here to-day, and offered a two pound note, which you have stopped: it is my note, and I must have either the note or the change." After the learned Judge had summed up the evidence, it was objected by the counsel for the prisoners that the evidence related to two distinct separate offences, and not to one joint offence, upon which the learned Judge said, that the

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the jury were to consider whether the woman was guilty of uttering the note at the shop, or the man of disposing of it to her, but that they could not convict both; that the man could not be convicted unless the jury were satisfied that he gave the very note stated in the indictment to the woman for a fraudulent purpose, knowing it to be a bad one; nor the woman, unless they were satisfied that she put the note away, knowing it to be forged; and that they must consider which they would convict, if either appeared to be guilty. The jury acquitted *Hudson*, and found *Palmer* guilty; but judgment was respited, that the opinion of the Judges might be taken, Whether the evidence given would support the conviction of *Palmer*?

The opinion of the Judges was on this day declared to the prisoner at the *Old Bailey* by

ROOKE J. who (after stating the case) proceeded thus. In this case two questions have been proposed for the consideration of the Judges; one was, Whether the evidence supported the conviction upon the count, for uttering and publishing the note as true, knowing it to be forged; and the other was, Whether the evidence supported the conviction upon the second count, for disposing of and putting away? As to the first of these it seemed to be the general opinion of the Judges, that if the woman *Sarah Hudson* had been innocent, and had not known the note to be forged, you would have been rightly convicted upon the first count, for uttering and publishing the note as true, knowing it to be forged, according to the doctrine laid down by Mr. Justice *Foster*, in his third Discourse, *c.* 1. *s.* 3. that where an innocent person is employed for a criminal purpose, the employer must be answerable. But Mr. Justice *Le Blanc* stated to us, that it appeared at the trial that *Sarah Hudson* knew the note to be a forged one.

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Upon that being reported, the Judges have formed no opinion upon the evidence as applying to the count for uttering and publishing the note as true, knowing it to be forged, thinking it sufficient to consider the case upon the other count, the question with respect to which is, Whether the facts here stated amount to a disposing of or a putting away within the meaning of the 15 *Geo.* 2. *c.* 13. *s.* 11.? Upon this point there has been a difference of opinion among the Judges; some have held that this is not an offence within the statute, because till she had uttered the note it ought to be considered as in your possession; and when she did utter it, you was only an accessary before the fact, and should have been so indicted; but the majority of the Judges, of whom I am one, are of opinion that the conviction is right. As to the constructive possession, it is by fiction of law only that when the actual possession is in one person, the constructive possession shall be considered in another, and these fictions are adopted for the sake of promoting justice; but they ought not to be adopted when they tend to defeat this purpose. In this case you delivered the note to *Sarah Hudson* for a fraudulent purpose: you could not have recovered it back by any action at law; it was out of your legal power; and when it was actually uttered by her, she had effected the purpose for which it was delivered to her, and the note was disposed of and put away. The question then is, What offence did the Legislature intend to prevent by the 11th section of 15 *G.* 2. *c.* 13.? If their intention is clear, the consideration of a constructive possession in you does not appear of sufficient weight to restrain the ordinary construction of the words of the statute. The words of the statute are, "if any person shall offer, or dispose of, or put away, any forged, counterfeited, or altered note." Now uttering was a capital offence by a former statute,

and

and as delivering an instrument to another is a step towards uttering, it seems most consonant to the intention of the Legislature to hold that a delivery to another, with a fraudulent purpose, is an offence within the words "dispose of or put away." For these reasons the majority of the Judges (and indeed a very considerable majority) are of opinion that the conviction is right upon the count for disposing of and putting away.

Sentence of death was accordingly pronounced.

THE END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term.

In the Forty-fifth Year of the Reign of GEORGE III.

OWEN *qui tam v.* BARROW.

Nov. 19th.

In an action on the statute for usury in discounting a bill, it was proved that one *B.* demanded payment of the acceptor, and commenced an action against him, and afterwards received the amount of the bill and the costs of those proceedings on producing the bill, and gave a receipt as attorney for the present Defendant; this, without further evidence of *B.* being the agent of the Defendant, and without the production of the proceedings against the acceptor, was held good *prima facie* evidence to be left to a jury of the Defendant having received the usurious interest.

THIS was an action to recover penalties on the Statute of Usury. At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Trinity* term, it appeared that the usury was committed by the Defendant by deducting more than legal interest upon discounting a bill of exchange; but in order to affect him with the actual receipt of the amount of the bill, it was proved that a demand was made upon the acceptor by a person of the name of *Brown*, and proceedings instituted by him to compel payment; in consequence whereof a person on behalf of the acceptor paid to *Brown* the amount of the bill and the costs of the suit on his producing the bill for which

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Brown gave a receipt as attorney for *Barrow* the present Defendant. It was objected for the Defendant, that there was no evidence to shew that *Brown* was in fact the attorney for the Defendant, nor were any of the proceedings produced under which the acceptor had been compelled to pay the amount of the bill and the costs: and it was insisted that the Defendant ought not to be made liable to the penalties upon such evidence. His Lordship however thought that as *Brown* had the bill in his possession, and no account was given how it came there, it must be presumed that he had it from the Defendant, and acted as his attorney; and accordingly his Lordship left that matter to the jury, who found a verdict for the Plaintiff.

A rule *nisi* for a new trial having been obtained upon a former day,

Williams Serjt. now shewed cause, and contended, that whether *Brown* was or was not the attorney of the Defendant was a fact to be collected from his conduct and the circumstances of the case, and that the question was properly left to the jury.

Best Serjt. *contrà* urged that no evidence had been adduced to shew that the amount of the bill ever came to the hands of the Defendant, or that *Brown*, who received the money, was his agent; that the proceedings in the cause not having been produced, it did not appear that *Brown* was attorney in that cause, and if not, the case only amounted to this, that *Brown* had taken upon himself to give a receipt as attorney for the Defendant when he was not so.

Sir JAMES MANSFIELD Ch. J. I retain the same opinion which I held at the trial; and still think there was sufficient evidence to be left to the Jury. If *Brown* was

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was not the attorney of the Defendant, how came the acceptor's agent to find him out as such, and how came *Brown* to have the bill in his hands? We all know that the production of a bill of exchange is in general sufficient to warrant payment of the amount to the party who produces it.

ROOKE J. *(a)* I am of the same opinion. The case appears to me to have been properly left to the Jury, the question being not whether *Brown* was the attorney of the Defendant, but whether he was his agent? If the question had been whether he was attorney, the case might have been otherwise. In questions of bribery, we all know that the agents are seldom proved to have been regularly constituted. *Brown* was in possession of the bill, and there was no evidence to rebut the presumption arising from that possession.

CHAMBRE J. I am of the same opinion. I should be sorry to have it laid down as a general rule that agency must be proved by the agent himself. The only question in this case is whether there was not *prima facie* evidence to go to a Jury of *Brown* being the agent of the Defendant. *Brown* was in possession of the bill; and that of itself accredited him as the agent of the Defendant. Indeed if we were to presume otherwise, we must presume *Brown* to have been guilty of a felony: for he must have acted as the agent of *Brown*, or have given a valuable consideration for it, or have come by the bill improperly. I think that there was not only *prima facie* evidence to be left to a jury, but very strong evidence to support the verdict.

Rule discharged.

(a) Mr. Justice *Heath* was absent from indisposition.

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ATTY and Another *v.* PARISH and Another, Executors of R. CHARNOCK.

If a contract of freight and demurrage be entered into by deed, the Plaintiff cannot declare in debt generally and give the deed in evidence; but ought to declare upon the deed.

THIS was an action of debt for the carriage of divers goods, wares, and merchandizes, carried and conveyed in divers ships and vessels from and to divers places, and for the use and hire of divers other ships and vessels from and to divers places, and for demurrage before that time due and of right payable by the defendant's testator for his detention of divers other ships and vessels employed by him. There were other counts in debt for money had and received, money paid, and on an account stated. The Defendants pleaded *nil debent.*

At the trial of this cause before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Trinity* term, the Plaintiffs, after proving the carriage of the goods of the Defendant's testator and the detention of the Plaintiffs' ship, gave in evidence a charter-party entered into between themselves and the Defendant's testator, to ascertain the amount agreed upon for freight and demurrage. Upon this it was objected that the Plaintiffs must be nonsuited, not having declared upon the charter-party. His Lordship permitted a verdict to be given for the Plaintiffs with liberty to the Defendants to move that a nonsuit should be entered.

Accordingly, a rule *nisi* for that purpose having been obtained,

Shepherd and *Bayley* Serjts. now shewed cause. The Plaintiffs were well warranted in their mode of declaring; and the evidence offered in support of the declaration was properly received. Wherever the statement of a contract between parties appears upon the face of a declaration

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ration to be such that the Plaintiffs might equally recover whether the contract be by deed or not, though the contract in point of fact be by deed, it is not necessary for the Plaintiff to declare upon the deed. If indeed the contract be such that unless it be entered into by deed the Plaintiff cannot recover, then he must declare upon the deed. If, in an action for goods sold and delivered, or for wages, it should appear that the price of the goods, or the *quantum* of the wages was settled by deed, it would be no ground of nonsuit that the Plaintiff had not declared upon the deed; for the debt would arise upon the meritorious consideration of the delivery of the goods, or the labour performed, and not upon the deed, since the deed itself, though it might be material to establish the *quantum* of price, would be immaterial to the ground of action. Thus in debt for rent the declaration alleges the debt as arising from the occupation of the premises, and the indenture of demise is mere matter of evidence. *Kemp* v. *Goodall*, 1 *Salk.* 277. *Warren* v. *Consett*, 8 *Mod.* 107. If the deed be only inducement to the action, it need not be shewn to the Court. *Com. Dig.* tit. *Pleader*, O. 15. In *Hardres* 332, it is said in argument, that where an action of debt is grounded upon a matter *in pais* only, as upon prescription, or upon a deed that is not requisite to maintain the action, as for rent reserved upon a lease by deed, *nil debet* is a good plea. The reason why in debt for rent it is not necessary to declare upon the deed is, that the debt does not arise from the deed but from the occupation. So here the debt arises from the use and occupation of the ships, not from the charter party. The only difference between the two cases is, that one respects land, and the other a personal chattel. It is true that in the case of a bond the declaration must state the bond, the reason of which is that there is no foundation for the obligation except the solemnity of the instrument entered into between the parties; and it

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matters not, provided the bond be proved, whether any consideration for the deed appear. Then in truth the existence of the bond is the *gist* of the action. In considering this case, some attention must be paid to the distinction between actions of *assumpsit* and actions of debt. In the former, an agreement must be declared upon, because no implied promise can be raised where an express promise has been reduced into writing by the parties: but in an action of debt, no promise is necessary to support the action, inasmuch as the action is founded upon that obligation which arises by law out of the circumstances of the case. The issue on this record is whether the Plaintiff's testator was indebted or not? Now suppose a special verdict in which the jury were to find that the Defendant was indebted, but that he was indebted by deed, and the Plaintiff had not declared upon a deed, would he not be entitled to recover? [*Chambre* J. The declaration here imports nothing more than a parol agreement; and the issue is whether the Defendant be indebted *modo et forma.*]

Best Serjt. *contra.* The plain rule has always been, that where a deed is the foundation of the action, that deed must be stated upon the record, in order that the Court may judge of its contents, and ascertain whether its provisions be legal or illegal. The true question in this case is not whether the Defendant be indebted to the Plaintiff, but whether he be indebted in the manner in which the Plaintiff alleges. If there be any contract between these parties it is a contract by deed, and wherever there is any such express contract the Plaintiff is precluded from setting up any other contract. In *Thursley and Hall* v. *Plant*, 1 *Sid.* 401, it is said, that a lessor cannot maintain debt for rent against the original lessee after assignment, but only covenant; which shews that the action of debt for rent is not founded upon the contract.

When

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When an action is founded on a deed the deed must be shewn to the Court. *Com. dig.* tit. *Pleader*, O. 3. Now the action in this case is founded on a charter-party, and in such actions it has hitherto been the universal practice to declare upon the charter-party. The case of debt for rent is an excepted case.

The Court took time to consider the matter until the next day, when their opinion was delivered by,

Sir JAMES MANSFIELD Ch. J. In this action of debt the Plaintiffs have declared that the Defendant was indebted to them in a certain sum of money, without specifying any particular time at which it was to be paid, for the carriage of divers goods conveyed in divers ships from and to divers places, for the use and hire of divers other ships from and to divers places, and for the demurrage of divers other ships employed by the Defendant's testator. This declaration therefore is as general in its form as can possibly be conceived, nor are any of the peculiar circumstances even hinted at. The declaration would lead us to suppose that the Defendant's testator had entered into a contract, respecting the subjects on which he is now charged, in the most general way in which such contracts can be entered into; (though with respect to demurrage, I take it to be perfectly clear that there is no particular custom of trade which fixes the rate of payment, but that it is always regulated by express stipulation;) and that the money having become due, the amount was to be ascertained by the law. To support this declaration at the trial a contract of charter-party under seal was produced, which contract was extremely long, and very particular in the provisions which it contained. The Defendant's testator appears to have endeavoured to secure himself by very special covenants from any misconduct on the part of the master, and to have stipulated that no freight

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should be paid for the outward voyage, but that when the ship should have performed her homeward voyage, and all the covenants contained in that charter-party, that then she should have earned her freight. These covenants therefore amount in fact to conditions precedent. The charter-party contains other covenants for the payment of such demurrage as is therein mentioned, and freight for and upon every ton of goods that should be brought into the port of *London*, to be paid in the manner set forth in the charter-party and not otherwise. The covenants therefore in this charter-party are as special as can be imagined. Such then being the agreement between the parties, what is the foundation of the contract upon which the present action is brought? Unquestionably the deed of charter-party is that which comprehends every thing by which the Defendant's testator was bound. Are we then to say that all the precedents in pleading are now for the first time to be overturned, and the Defendant to be deprived of the advantage of having a *profert* made of that deed which is the foundation of the action in which he is sued? Having stated the declaration and the deed, I do not know in what manner I can more strongly argue against the form of the declaration. If it be admitted, as it must be, that wherever the action is founded on a deed, the deed must be declared upon, I would ask, is not the action in this case founded on the charter-party? A course of argument has been adopted which either I do not understand, or do not feel the application of. It has been said, that where a party may recover in an action, whether such action be founded on a deed or not, the party may recover without declaring on the deed, though the contract be reduced into a deed: and in support of this, it has been contended that if goods be sold or wages earned, and the price of the goods or the amount of the wages be ascertained by deed, yet inasmuch as goods may be sold and wages earned without

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without the intervention of a deed, the person who sues for money due to him on account of such sale or earnings, may recover without declaring on the deed. But no case has been cited to maintain that argument, and it seems to me absurd to contend that the action is not founded on a deed, because if there had been no deed the action might have been well maintained without it. The only case excepted from the general rule is that of debt for rent, in which the deed need not be declared upon. That exception however seems to have proceeded on the ground that by the demise an interest has passed in the land. In the case cited from *Hardres*, though it is said that in debt for rent reserved upon a lease by deed *nil debet* is a good plea, yet it is added that in debt upon a grant of an annuity not issuing out of land such a plea would not be good: and the same distinction is made in *Warren v. Consett*. Since therefore all the books speak of the case of debt for rent as an exception, it is strong evidence to shew that in all other cases a deed must be declared upon. This action is founded upon a charter-party, a form of instrument upon which many actions are tried every year; nevertheless the mode of declaring here adopted has never been heard of in *Westminster-hall* till now. I have perhaps said more than was necessary upon so plain a case, and I have now only to add that we are all of opinion that a nonsuit must be entered.

Per Curiam, Rule absolute.

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HENSHAW and Another *v.* RUTLEY and Another.

The Court will not discharge a rule for changing the venue from *A.* to *B.* upon an affidavit, shewing that the cause of action arose partly in *A.* and partly in *B.*, and that all the witnesses reside in *A.* But the Plaintiff must undertake to give material evidence in *A.*

A RULE *nisi* for changing the venue from *London* to *Kent* having been obtained upon an affidavit that the cause of action, if any, arose in *Kent* and not in *London*,

Bayley Serjt. shewed cause upon an affidavit, which stated that the action was brought to recover damages for an injury done to his horse and chaise by the Defendant's waggon, and for the expences of medicines and attendance upon the horse: that the place where the injury happened was in *Kent;* that the horse was afterwards brought to *London*, where all the medicines were furnished and the attendances bestowed; and that all the witnesses resided in *London*. He urged that this affidavit afforded a sufficient answer to the Defendant's application, as it shewed that the whole cause of action did not arise in *Kent;* and he cited *Collins* v. *Jacobs*, 3 *Bos. and Pul.* 579.

But *the Court* said, that the Plaintiffs must undertake to give material evidence in *London;* and that this case was very different from that of *Collins* v. *Jacobs*, where the cause of action appeared to have wholly arisen in a county different both from that in which the venue was laid, and that to which the Defendants applied to remove it.

Rule discharged on an undertaking to give material evidence in London.

Shepherd Serjt. for the rule.

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PARSONS v. SALOMON.

Payment of the weekly allowance to a prison under the Lords' Act to the person who opens the door of the prison, is a sufficient payment to the prisoner within the meaning of the act.

THIS was an application to the Court to discharge the Defendant out of the custody of the warden of the *Fleet*, where he was in prison under a writ of execution at the suit of the Plaintiff, on the ground of an omission, on the part of the latter to pay the weekly allowance under the Lords' act.

On the part of the Plaintiff, a young man, who had been in the habit of paying the sixpences every *Monday*,, swore that on *Monday* the 10th of *September* (the day on which the omission was charged), he went to the door of the prison and there paid the money to the person who unlocked the door, but with whose person he was not acquainted. In this account he was confirmed by another man who accompanied him, who swore that he saw the money paid to a person within the door, but he could not say whether it was the person who unlocked the door.

On the part of the Defendant, three persons swore, that they were the only turnkeys employed on the 10th of *September;* that they never went off duty or delivered the key into the hands of any other person than one or other of themselves during the whole of that day; and that no money was received by either of them on the Plaintiff's account.

Bayley, Serjt. for the Plaintiff, insisted that if the account of the young man who paid the money was believed, payment to the person who opened the door must be considered to be a payment to the turnkey, which had always been deemed a sufficient compliance with the act of parliament.

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Best Serjt. for the Defendant, urged that though a payment to the turnkey might be deemed a sufficient compliance with the act, yet that a payment to his deputy was not to be so considered, the turnkey himself being the only person authorised by the warden of the *Fleet*.

Sir JAMES MANSFIELD Ch. J. The probability is, that one of the turnkeys, being absent for a short time, delivered the key into the hands of some other person, who thereby became the turnkey to all the world, and that the money was paid into the hands of that person. It is more likely that the turnkey should have forgotten this circumstance, than that the young man (who is confirmed as to the payment) should be perjured. If then the money was paid to the person who opened the door, that person was the turnkey *quoad* the Plaintiff. To decide otherwise would open a door to perpetual frauds.

HEATH J. The evidence of the fact of payment appears to me satisfactory, and the only question is, whether that payment were made to the proper person. Now the turnkeys may be changed from day to day. The opening the door therefore and receiving the money must be considered as sufficient.

ROOKE J. I think the weight of evidence against the application.

CHAMBRE J. The act of parliament requires payment to the debtor; but the Courts in construing the act have considered payment to the turnkey as payment to the debtor. Then who is the turnkey? The turnkey may be changed every day, and how is the agent of the creditor to know to whom he is to pay the money? It seems to me that whoever is intrusted with the care of the door is, with respect to creditors, the turnkey. As to the fact of

of payment, I think the weight of evidence against the application. But it lies on the debtor to make out the omission, and if the Court are in doubt to which side to give credit they must leave matters as they find them. In this case however we need not trust to that principle, for the weight of evidence is in favour of the creditor.

Rule discharged.

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PARSONS v. SALOMON.

SAMUEL BUTCHER *v.* EDWARD AUGUSTUS BUTCHER.

Nov. 21st.

THIS was an issue directed by the Court of Chancery to try whether any sum of money was due on a bond of indemnity given by the Defendant to his mother *Elizabeth Butcher* deceased, in the penal sum of 2000*l.* bearing date the 26th of *April* 1800.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Trinity* term, the following facts appeared in evidence. The bond in question was given by the Defendant to indemnify his mother against another bond of the same date given by her on his behalf, and was, in the penal sum of 2000*l.*, conditioned for the payment of 1000*l.* within three months after her decease.

A. The mother of *B.*, having entered into a bond, on his behalf for 1000*l.* *B.* executed an indemnity bond, of the same date, viz. 26th *April* 1800, in the sum of 2000*l.* conditioned for the payment of 1000*l.* three months after her decease; on the 9th *February* 1801, *A.* made a codicil to her will, by which she relinquished two debts due from him, one of 1000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1000*l.* bond of the 26th of *April*; three days after the execution of this codicil, *A.* executed a release to *B.*, in which, after mentioning a sum of 500*l.*, for which she had his bond, and two sums of 480*l.* and 300*l.* due to her from *B.* for which she had receipts, expressed that she had agreed to release *B.* from those sums, "and of and from all or any other sum or sums of money, claims, and demands, thereby secured or intended to be secured, and all other sum or sums of money, claim, and demand whatsoever;" and released him accordingly from those sums and all claim on account of those sums, "or for or on account of any other matter, cause, or thing whatsoever." Held, 1st, that this release did not extend to the indemnity bond, and, 2dly, that no extrinsic evidence could be admitted to explain the intentions of A. as to the release.

On

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On the 9th of *February* 1801, *Elizabeth Butcher* made a codicil to her will, in which, after giving the Defendant 2000*l.* 3 *per cent.* consols, instead of 200*l.* like Annuities, which she had given him by her will, she recites that she had by her will noticed two certain debts of 1000*l.* and 500*l.* due from the Defendant, and had relinquished the debt of 500*l.*, and given to the Defendant two years after her decease to pay the debt of 1000*l.*, and then proceeds to relinquish not only the debt of 500*l* but also the debt of 1000*l.*, and also all interest thereon; but she thereby "desired and directed her said son *E. A. Butcher* would punctually perform the condition of the bond entered into by him to her for indemnifying her estate and effects against the sum of 1000*l.* within three months after her death, for which she had executed a bond of like date to her son the said *E. A. Butcher*, without any pecuniary consideration, but entirely from the love and affection she bore him, and for his accommodation." Three days after the execution of this codicil, *viz.* on the 12th of *February* 1801, *Elizabeth Butcher* executed a release to the Defendant, which, after reciting a bond from the Defendant to one *S. M.* for 500*l.*, and that the money thereby secured was lent by her to her son, and that she had lent two other sums of 480*l.* and 300*l.* to her said son for which he had given receipts, and that she had agreed to release the Defendant from the said bond for 500*l.* and the money thereby secured, and also from the payment of the several sums of 480*l.* and 300*l.* and all sums of money secured thereby, "and of and from all or any other sum or sums of money, claims and demands thereby secured or intended so to be, and all other sum and sums of money, claim and demands whatsoever," witnesses that the said *Elizabeth Butcher* had released the said sums of 500*l.*, 480*l.*, and 300*l.*, and the interest thereof, and the said bonds and other securities given for the same, and also all actions, &c. debts, accounts, and reckonings,

reckonings, &c. against the Defendant, which the said *Elizabeth Butcher* then had, or might at any time thereafter have, on account of the said several sums of money having been so advanced and lent, and the said bonds and receipts having been so respectively given, or on account of any other sum or sums of money lent and advanced by her to the Defendant, "or for or on account of any other matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents." The Defendant's counsel then offered to prove that the above release was handed to the Defendant by the solicitors of *Elizabeth Butcher*, but that *Elizabeth Butcher* having shortly afterwards expressed her apprehension that as she had thereby made her son independent of her he would return to *India*, where he had formerly been an officer, he returned the release and the bonds therein mentioned to her, saying he should be quite as well satisfied with their being in her custody as in his own; after which, *Elizabeth Butcher* herself inclosed and sealed up the release and bond for 500*l.* and the other securities mentioned in such release, together with the bond of indemnity, and in her own hand wrote thereon "Mr. *Edward Augustus Butcher*, to the care of *M. Mackay* Esquire;" and that after the death of *Elizabeth Butcher*, Mr. *Mackay*, who was one of her executors, delivered over the packet containing the bond of indemnity, as well as the other securities, to the Defendant. His Lordship refused to admit this evidence, and at the same time expressed an opinion that the evidence itself, so far from evincing an intention in the mind of *Elizabeth Butcher* to reliquish the bond of indemnity, had a contrary tendency; whereupon a verdict was found for the Plaintiff.

On a former day, a rule was obtained calling on the Plaintiff to shew cause why a verdict should not be entered for the Defendant, or a new trial be had, as well on the ground of the words of the release being sufficiently extensive

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BUTCHER v. BUTCHER.

extensive to cover the bond of indemnity as of the admissibility of the evidence offered to shew the intention of *Elizabeth Butcher*; and it was then said that the case of *Thorpe* v. *Thorpe*, 1 *Lord Ray.* 235., where it was laid down that general words in a release are to be restrained by a particular recital, did not apply to this case, since the release in question recited an agreement to release all claims and demands whatsoever.

The matter was to have been discussed upon this day, but *The Court* having intimated a strong opinion that no evidence could be admitted to explain the release, since the doubt, if any, was *ambiguitas patens*, and that the release itself did not extend to the indemnity bond, and having also observed that the inference from the circumstances offered in evidence was as much against as in favour of the Defendant,

Shepherd and *Best* Serjts. declined arguing the case.

Lens and *Bayley* Serjts. for the Defendant.

Rule discharged.

Nov. 24th.

TRENT and Others *v.* HANNING and Others.

A. by will gave to his wife an annuity of 200*l.* for her life, in addition to her jointure, (which was secured upon an estate in the *West Indies*), and 6000*l.* to his two younger children, to be paid at 21, and appointed *B. C.* and *D.* as trustees of Inheritance for the execution thereof. Held that no interest passed to *B.*, *C.*, and *D.*, in the testator's real estates.

THE following case was sent by the Master of the Rolls for the opinion of the Judges of this Court.

John Trent, being seised in fee of certain plantations and premises in the island of *Barbadoes*, in contemplation of a marriage between him and *Elizabeth Phipps*, which

soon

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soon afterwards took effect by indentures of lease and release, bearing date the 29th and 30th days of *October* 1792, bargained, sold, aliened, released, and confirmed the said plantation and premises to *Samuel Estwick*, to hold to the said *Samuel Estwick*, his heirs, and assigns, to the use of the said *John Trent* till the marriage, remainder to the use of the said *John Trent* and his assigns for life, without impeachment of waste, with remainder in trust, to secure an annuity of 500*l*. a-year for her life to the said *Elizabeth Phipps* in lieu of dower, with remainder to trustees for 200 years for better securing the payment of the said annuity, with remainder to the said *John Trent* in fee. The said *John Trent*, on the 5th day of *August* 1796, made his last will and testament in writing (duly executed and attested so as to pass real estates), in the words following (that is to say:) "I, *John Trent*, do hereby give unto my wife 200*l*. *per annum* during her natural life, in addition to her jointure, my just debts being previously paid; and I do give unto my two younger children 6000*l*. each, to be paid when they severally come to the age of 21 years; and I do appoint *John Hanning*, *William Hanning*, and *Constantine Phipps as trustees of inheritance* for the execution thereof." The said *John Trent* afterwards died, without revoking or altering his said will, leaving his widow, the two younger children mentioned in his will, and a child born afterwards, to whom he gave 6000*l*. by a codicil, him surviving. The said *Constantine Phipps* survived the said *John Trent*, but is since dead. The question for the opinion of the Court was, Whether the said *John Hanning*, *William Hanning*, and *Constantine Phipps* took any and what estate or interest in the real estates of the said *John Trent*, under and by virtue of the will of the said *John Trent*, or whether they had, by virtue of such will, a power to make any conveyance or appointment of any and what estate or interest of or in such real estates; and if they had, Whether such

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power survived to the said *John Hanning* and *William Hanning*?

Bayley Serj. for the Plaintiffs. The question is, Whether the testator, by appointing trustees of inheritance, has not thereby given to them the inheritance in his real estates? It is a gneral rule, in construing wills, that effect is to be given to every word of the will, provided the intention of the testator can be collected. The will having been attested by three witnesses is calculated to pass real estates, and as the testator has appointed certain persons trustees of inheritance, he must have intended to pass something which is the subject of inheritance. Had he given to them his inheritance by express words, for the purpose of carrying the dispositions of his will into effect, there can be no doubt that all his hereditaments would have passed. Personality, not being the subject of inheritance, cannot be the object of this clause: unless therefore the testator be considered as having given his real estate, his intention will be completely frustrated.

Best Serjt. for the Defendants. The heir at law is not to be disinherited, unless the words of the will shew a manifest intention to exclude him. But there is nothing on the face of this will to shew such an intention. It is said that the word inheritance necessarily points to the real estates. But from this will the testator does not appear to be much acquainted with technical terms; it is therefore very possible that he may have supposed personality to be the subject of inheritance. Be that as it may, he has not used any expression which imports any gift of the reality; and, without such expression, the heir at law is not to be deprived of his estate.

Sir JAMES MANSFIELD Ch. J. In the construction of devises, much is often said about necessary implication, an expression

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expression which is taken from a case in *Vaughan* (*a*), which certainly proceeded upon implication; but the doctrine of implication is perpetually resorted to where nothing is to be implied, and where the courts have merely to put a construction upon particular words. Here the whole question turns upon the meaning of the words "trustees of inheritance;" and it seems to me impossible so to construe them as to give to the trustees an estate in fee in the testator's real estates. The only circumstance which points at the real estate is, that he gives to his wife 200*l. per annum* in addition to her jointure. Now jointure is generally supposed to apply to real estate; and he might possibly have had the estate in contemplation on which the jointure was secured, subject to which he had the inheritance in fee. When therefore he appoints these persons trustees of inheritance, he might intend to give them the inheritance in the real estate; but I believe there never has been a case in which such words as those here used have been deemed sufficient for that purpose. If, on the other part of the will, it should be thought that 6000*l.* is charged upon the real estate, a court of equity may direct the heir at law to pay it; but that is not a subject of consideration here. I now understand that the testator had an estate in *Somersetshire*, as well as in the *West Indies*; and this increases the difficulty; for we cannot so construe the words trustees of inheritance as to give an estate in fee to the trustees, without extending them to all the real estate: and yet if the testator meant to give an estate in fee by those words, he probably only meant to give the reversion in his settled estate.

HEATH J. In construing this will, the Court cannot proceed upon conjecture. If we could, I should be in-

(*a*) *Gardner* v. *Sheldon*, *Vaugh.* 259.

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clined to agree in the construction suggested by the counsel for the Defendants.

ROOKE J. I am of the same opinion.

CHAMBRE J. So ignorant as this testator appears to have been, we may suppose he might possibly have meant merely that these persons should be trustees of the legacies when raised. He might perhaps wish that the legacies should go to them and their heirs in trust, not knowing that the money could not go to their heirs; he has therefore improperly described them as trustees of inheritance. But the expressions are much too uncertain for the Court to proceed upon.

The following certificate was sent to the Court of Chancery.

This case has been argued before us by counsel, and we are of opinion that the said *John Hanning*, *William Hanning*, and *Constantine Phipps* did not take any estate or interest in the real estates of the said *John Trent*; and that the said *John Hanning*, *William Hanning*, and *Constantine Phipps* had not, by virtue of such will, a power to make any conveyance or appointment of any estate or interest of or in such real estates.

J. MANSFIELD.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

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BARNARD, one, &c. *v.* BERGER.

Nov. 24th.

If the affidavit, upon which a motion for an attachment be founded, merely state that the officer of the sheriff was served with a copy of the rule to bring in the body, but does not add that the original rule was shewn to him, the Court will set aside the attachment.

THIS was a rule to shew cause why a former rule, for an attachment against the sheriff of *London*, should not be discharged. The attachment in fact had never issued, as bail were put in upon the very day on which the attachment was moved for; and the object of this application was to get rid of the costs of the rule for the attachment. The objection was that the affidavit, upon which the motion for the attachment was grounded, only stated that the clerk to the secondaries of the city of *London* was served with a copy of the rule to bring in the body, but did not add, that the original rule was at the same time shewn to him. The case of *The King* v. *Smithies*, 3 *T. R.* 351. was cited.

The Court, upon this objection, made the rule absolute to discharge the rule for the attachment.

Best Serjt. in support of the application.

Clayton, Serjt. *contrà.*

FIELD *v.* SERRES.

Nov. 24th.

In an action of debt on a bond by the trustee of the Defendant's wife, to enforce payment of an annuity secured to her, the Court refused to allow the Defendant to withdraw the general issue, and plead, 1st, that the Defendant's wife had committed adultery, and was living in that state; and, 2dly, that she had committed adultery at the time when the bond was executed in her favour, though the Defendant was ignorant thereof, being of opinion that such pleas, if pleaded, would not have been a good defence to the action.

DEBT on a bond given to secure an annuity to the Defendant's wife. The action was brought by the trustee to recover the arrears of the annuity.

The Defendant, having pleaded the general issue, applied to the Court for leave to withdraw that plea, and plead, first, that his wife, for whose maintenance the

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annuity was given had committed adultery, and, at the time when the action was commenced, was living in a state of adultery. Secondly, that before the making the bond the Defendant's wife had committed adultery, and that the said bond for securing the said annuity was given by the Defendant in ignorance of the adultery. The motion was made upon the terms of the Defendant paying the costs occasioned by the plea, and by this application.

A rule *nisi* having been obtained, cause was shewn this day, and affidavits read on both sides. In support of the application it was stated that the declaration was delivered on the 13th of *November*, with a notice to plead in four days; that the Defendant, before the expiration of the four days, took out a summons for further time, but the order not being consented to, he was obliged to plead the general issue, in order to prevent judgment being signed, his special pleader having been unable to prepare the two special pleas in time. On the part of the Plaintiff it was sworn, that the action was commenced in *August*; that on the 15th of *November*, *oyer* of the bond was demanded, which was given on the next day; and that the Defendant's attorney was the person who originally prepared the bond.

Onslow Serjt., in shewing cause, referred to *Sidney* v. *Sidney*, 3 *P. Wms.* 269., in which Lord *Talbot* held that the jointure of a married woman was not forfeited by adultery, though her dower was; and also to *Blount* v. *Winter*, and *Winter* v. *Blount*, 3 *Cox's P. Wms.* 276. *note* 2., in which a husband was decreed to perform marriage articles, notwithstanding his wife was living in adultery.

Bayley Serjt., in support of the application, insisted that upon this motion the Court would not decide whether the plea, when pleaded, would be a good defence or not; and that it appeared that the Defendant applied for leave to plead several pleas as soon as he discovered, by

by the inspection of the deed, that such pleas were material.

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FFELD v. SEARES.

Sir JAMES MANSFIELD, Ch. J. It is the practice of this Court to look into the nature of the pleas when leave to plead several pleas is applied for. Now in this case it appears to me to be perfectly clear that the pleas, if pleaded, would not afford a defence to the action. I think, therefore, that we ought not to attend to the application.

HEATH J. This is not a very common case. But the Court always consider, when leave to plead several pleas is asked, whether the pleas would amount to a good defence. Indeed I have known the Court refuse to allow a Defendant to plead alien enemy with the general issue (*a*). It does not appear to me that the pleas proposed to be pleaded are good. They are pleas introducing much scandalous matter upon the record, and I think that we ought not to allow them to be pleaded.

ROOKE J. I am of the same opinion.

CHAMBRE J. I am of the same opinion.

Rule discharged.

(*a*) *Feron* v. *Ladd*, 2 *Bl.* 1326. *Angerstin* v. *Vaughan*, 1 *Bos. & Pul.* 222 *in notis.*

HARDISTY *v.* STOREY.

Nov. 26th.

IN this case, the only question was whether, on motions by bail to stay proceedings on bail bonds, or against the sheriff on payment of costs, it was necessary to produce an affidavit of merits.

If the bail apply to stay proceedings upon the bail bond, or against the sheriff, they need not swear to merits, though a trial has been lost.

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HANDISTY v. STORER.

Per Curiam. The Court do not require the bail to swear to merits; nor is there any distinction in this respect whether a trial has been lost or not.

Shepherd Serjt. in support of the motion.

Bayley Serjt. *contra.*

Nov. 26th.

ANSTEY *v.* MARDEN.

A. being insolvent, a verbal agreement was entered into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10*s.* in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to *B.* Held that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts.

ASSUMPSIT. The declaration stated that in consideration that the Plaintiff had sold out a thousand pounds 5 *per cent.* bank annuities, and paid the produce to the Defendant, the Defendant undertook to replace the same before the stock should be shut; which he had not done. The second count was *indebitatus assumpsit* for a certain share, to wit, 1000*l.* in the 5 *per cent.* bank annuities. To which the money counts were added.

First plea, *non assumpsit.*

Secondly, the Defendant pleaded that the Plaintiff ought not to have or maintain his aforesaid action thereof against him the said Defendant to recover any more or greater damages in this behalf than the sum of 525*l.*, because he says that the Defendant, on, *&c.* at, *&c.* was indebted to the Plaintiff, by virtue of the said several promises and undertakings in the said declaration mentioned, in the sum of 976*l.* 2*s.* 6*d.* and no more, and that he, the said Defendant, afterwards and before the commencement of this suit, to wit, on, *&c.* at, *&c.* was also indebted to divers other persons, to wit, *James Greenwood, &c. &c.* in certain other large sums of money respectively, and the Defendant being so indebted as aforesaid, the Defendant was then and there unable to pay them, his said creditors, the full amount of the said several debts, whereof the said Plaintiff and the said several

several other creditors of the said Defendant then and there had notice; and it was then and there computed and agreed, upon an investigation then and there had, by, between, and amongst the Plaintiff and the said several other creditors of the Defendant, that the estate and effects of the said Defendant would not extend to pay 10*s.* in the pound on the amount of the debts due and owing by the Defendant, of which the Plaintiff and the said several other creditors also then and there had notice: whereupon it was then and there proposed and agreed, by, between, and amongst the Plaintiff and the said several other creditors of the Defendant, and also by *Thomas Weston*, by the procurement of the Defendant, and at the request of the Plaintiff, that the said *Thomas Weston* should and would pay out of his own proper monies to the Plaintiff and the said several other creditors of the Defendant, a sum of money equivalent to 10*s.* in the pound on the amount of their respective debts, in full satisfaction and discharge thereof; which said sum of money they the plaintiff and the said several other persons, creditors of the Defendant, should and would severally accept and receive in full satisfaction and discharge of their said respective debts; and the said agreement being so made as aforesaid, to wit, on, *&c.* at, *&c.* in consideration that the said Defendant, and also the said *Thomas Weston* by the procurement of the Defendant, and at the request of the Plaintiff, had then and there undertaken and faithfully promised the Plaintiff to perform and fulfil all things in the agreement contained on their respective parts to be performed and fulfilled, the Plaintiff and the said several other creditors of the Defendant undertook and then and there faithfully promised the Defendant to perform and fulfil all things in the said agreement contained on their parts and behalfs to be performed and fulfilled: and the Defendant avers that in consideration and in pursuance of the said agreements afterwards and before the commencement of this suit, to wit, on, *&c.* at, *&c.* the said *Thomas Weston* tendered

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another were the original cause of the undertaking. If it be part of the contract that the original debtor shall be discharged, that is a sufficient consideration to support the undertaking of another to pay the debt; but if no such stipulation be made, and the original debt be permitted to subsist, the undertaking is merely collateral. It is true that where nothing more is stipulated for than an indulgence to the debtor, or that an action commenced shall be stayed, the undertaking of a third person to pay the debt is within the statute, for the original debt still continues, and the undertaking is but collateral. Such was the case of *Fish* v. *Hutchinson*, 2 *Wils.* 94. But in *Roe* v. *Haugh*, 1 *Salk.* 29. where, in consideration that *B.* would accept *C.* to be his debtor in the place of *A.*, *C.* undertook to pay the debt, this undertaking was considered to be a new contract. This case differs from most of those which have arisen on the statute of frauds, because it was expressly agreed at the meeting which took place between *Weston* and the creditors, that the Defendant was to be discharged altogether, and *Weston* was to have an assignment of the Defendant's debts, by means of which he might possibly pay himself. That was not the case in *Chater* v. *Beckett*, 7 *T. R.* 201. It was no part of the agreement there that the original debtor should be altogether discharged; nor were there any effects out of which the person undertaking to pay the composition could reimburse himself. In *Case* v. *Barber*, Sir *T. Ray.* 450. the same distinction is recognized, *viz.* that the party undertaking must be solely responsible for the debt. The question therefore is, Whether the promise by *Weston* was merely collateral, or whether it was an original undertaking? By the assignment of the debts, *Weston* secured himself, and made himself sole creditor of *Marden*; to the exclusion of all other creditors. At all events therefore, he purchased the debts aginst *Marden*, and not on *Marden*'s account, but on account of that purchase made himself liable to the creditors. If so, this case falls directly within

within the principle of *Castling* v. *Auburt*, 2 *East*, 325. where one, who held some policies of a third person, having given his lien on those policies to a broker, and allowed him to collect the money due upon them, on his undertaking to pay him the sum for which he held the policies, was allowed to recover upon that promise against the broker, although it was objected that the broker's promise was a promise to pay the debt of another within the statute of frauds. Here the Court held it to be a purchase of the Plaintiff's interest in the policies. In this case, *Weston* did the same thing when he took the assignment of the debts, and therefore the same result must follow. But independent of this last ground, there is another upon which Lord *Kenyon* relied in *Butler* v. *Rhodes*, 1 *Esp. N. P. Case.* 236, *viz.* that a creditor, who agrees to a composition, and orders a deed of assignment of all his debtor's effects to be prepared, which the debtor executes, shall not afterwards recede from his engagement, refuse to execute the deed and sue for his original debt. His lordship there nonsuited a Plaintiff suing under such circumstances, holding his conduct fraudulent. So in this case the Plaintiff ought not to be allowed to sue for his whole debt, after having induced the rest of the creditors to sign an agreement to accept 10*s.* in the pound, and actually bar themselves, by the receipt of that sum, from all further claim against *Marden*.

Cockell and *Bayley* Serjts. *contrà*. In this case it was not in the contemplation of the one party to buy, or of the other to sell the debts; the transaction therefore cannot be considered in the light of a purchase. The promise by *Weston* was *nudum pactum*, because no forbearance of a suit or other advantage of a kind which the law deems a good consideration was obtained thereby. *Forth* v. *Stanton*, 1 *Williams's Saund.* 210. *Case* v. *Barber* is an authority in favour of the Defendant, for there the agreement

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agreement was held to be without consideration, and within the statute; and that determination took place soon after the passing of the statute, which entitles it to great weight. In *Lynn* v. *Bruce*, 2 *H. Bl.* 317., it was holden that a promise by one to pay so much in the pound of his own debt, in satisfaction and discharge of the debt, was not founded on a good consideration, because a mere accord is not a good ground of action. In *Castling* v. *Aubert* the reasoning proceeded entirely upon the distinction between agreements which are purchases of debts and those which are not; and in that case the lien which has been given up was something by which the debt might have been satisfied. But in the present case, what advantage could arise to *Weston* from purchasing the debts of an insolvent? With respect to the objection taken to the Plaintiff's conduct, as being fraudulent, it is to be remembered that he has never received any thing himself, and that the agreement was not entered into at a general meeting of the creditors, but at a meeting where something executory was proposed among a few creditors, which remained to be completed afterwards if those creditors continued in the same mind. The Defendant, having pleaded the agreement between *Weston* and the Plaintiff as a discharge of the debt of the latter, is precluded from now calling it a purchase. But the Plaintiff never having executed that agreement, or received any thing under it, is not bound to adhere to it.

Sir JAMES MANSFIELD Ch. J. At the trial of this cause, it was objected on the part of the Plaintiff, that the promise by *Weston* was a promise within the statute of frauds, and therefore no bar to the Plaintiff's demand. It appeared to me doubtful how far the promise in this case could be deemed to be within the statute; and it rather struck me that being a promise to pay only 10*s*. in the pound, and not to pay the whole debt, it was an original agreement, and therefore was not within the statute. I did

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did not see how one person could undertake for the debt of another, when the debt, for which he was supposed to undertake, was discharged by the very bargain. No cases, however, were at that time cited. We have now been considering all the circumstances of the case, and the question is, Whether justice will not be done by not allowing the Plaintiff to take more than what the strictest rule of law will entitle him to? The facts were shortly these. The Defendant was upon the brink of a bankruptcy; some of his creditors met to consider what should be done, and his effects being found only sufficient to pay 7*s.* 6*d.* in the pound, the creditors agreed to accept 10*s.* in the pound from *Weston* in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts; and *Weston* was to pay 10*s.* in the pound as the price of those debts. After this the Plaintiff went out of town, and some of the creditors accepted 10*s.* in the pound, and assigned their debts to *Weston*. The Plaintiff thought proper, first to deny his agreement, and then to insist on his right to change his mind and refuse to execute the deed. He had a right to change his mind, but in point of morality and sound honesty his conduct was extremely bad. It was equivalent to obtaining a promise from *Marden* privately for payment of the whole debt, after agreeing with the rest of the creditors to take a part only. He now comes here to set aside the verdict, in order to put into his pocket the other part of the debt for his own benefit, to which *Weston* is entitled. Supposing the promise by *Weston* to be a good promise in law, the Plaintiff cannot recover the original debt due from the Defendant to himself, inasmuch as he has agreed to accept 10*s.* in the pound in satisfaction of that debt, and to assign it to *Weston*, who is contented with the verdict. The Plaintiff has clearly been guilty of very harsh treatment towards the Defendant; and I do not think the Court called upon to alter the verdict as a favour to him.

He

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He has acted altogether contrary to honour and justice, and I think the verdict ought to stand. I would not have it supposed that I mean to throw any doubt upon the decisions which have been cited respecting the statute of frauds. The case of *Chater* v. *Becket* certainly decides that a mere promise, such as that before us, would be within the statute; and indeed, upon general principles, no one can wish to restrain the operation of the statute of frauds. The benefits of that statute are much more apparent to those who are conversant with the practice of the Court of Chancery, than those who have only seen the practice of the courts of common law. But upon the whole, it appears to me that the agreement by *Weston* amounted to a purchase of the Plaintiff's debt, and that this application for a new trial ought not to be granted.

ROOKE J. I am of the same opinion with my Lord Chief Justice. It seems to me that this is the case of a purchase of a debt. *Anstey* is not the only person here concerned. If he were suffered to recover, he would be guilty of a gross fraud upon the other creditors. *Weston* himself would be defrauded too; he thought to defer the bankruptcy of his son-in-law, and the principal creditors came into the agreement to accept 10*s*. in the pound, and to discharge *Marden* upon the faith of this agreement, the father-in-law taking the debts to himself with the chance of being reimbursed. *Anstey* authorised *Greenwood* to sign for him, and *Greenwood* signed for himself, as also did *Wilson* and *Weston*, all acting upon the expectation that *Anstey* would perform his promise. I think *Anstey* ought not to be permitted to say, I have tricked you, and will bring an action to recover my whole debt.

CHAMBRE J. I think upon the evidence, it is perfectly clear that this was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by *Marden*. It was of the substance

substance of the agreement that these debts should remain in full force to be assigned to *Weston*. When he had purchased them he did not mean to exact them rigorously, but the contract was a contract of purchase, and he had a right to make use of the names of the original creditors to recover the same to the full amount, if *Marden* had effects to satisfy the debts. Instead of being a contract to discharge *Marden* from his debts, it was a contract to keep them on foot; *Anstey* therefore, in that way of considering the case, had a right to recover from *Marden* for the use of *Weston*; but *Weston* now, instead of wishing an action to be brought in *Anstey*'s name, wishes that *Anstey* should have no effect from his verdict. Surely we, in the exercise of a discretionary power which we have, can never wish to set aside that verdict which real justice to the parties requires should stand. If the question had been that which it is represented to have been, on the special pleas, I should have thought it a case within the statute of frauds, but it is now unnecessary to decide that point, because we all agree fully upon the point that it is a contract for the purchase of the debts of *Marden*, which is not prohibited by the statute of frauds.

Rule discharged.

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HESSE *v.* STEVENSON.

Nov. 14th.

THE Plaintiff, having recovered judgment against the Defendant for 1954*l.*, sued out a *fi. fa.* under which he levied 400*l.*, and then arrested the Defendant for the residue in an action on the judgment. A rule having been obtained, calling on the Plaintiff to shew cause why the proceedings should not be set aside for irregularity, or the Defendant discharged on entering a common appearance,

Plaintiff having recovered judgment and levied part under a *fi. fa.* arrested the Defendant for the residue in an action on the judgment, he not having been arrested in the original action: and the Court refused to discharge him.

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Bayley Serjt. shewed cause, and contended that though where a party proceeds by *elegit*, and extends the lands of the Defendant, he cannot bring an action on the judgment, yet if he only levy part on the goods he may, *Glascock* v. *Morgan*, 1 *Lev.* 92.; *a fortiori*, therefore where the Plaintiff only levies part under a *fi. fa.* the action may be sustained; and if the action would lie, there was no reason why the Defendant might not be arrested.

Shepherd and *Onslow*, Serjts. in support of the rule, urged that the Plaintiff having made his election to proceed by execution, he could not bring an action on the judgment, though he might have sued out a *ca. sa.*, and that even if the action would lie, it was oppressive to arrest the Defendant under such circumstances. They cited *Dyer*, 299. *b. pl.* 34. and 1 *Roll. Abr.* 601. *pl.* 4.

Per Curiam. The case of *Glascock* v. *Morgan* is in point. That reported in *Dyer* and *Roll* does not apply: for as the *elegit* in that case was not returned, *non constitit* that the Plaintiff might not extend the lands. It is admitted that a Plaintiff, after levying part under a *fi. fa.* may sue out a *ca. sa.*, and if so, why may he not bring an action? But supposing it to be questionable, whether the action can be sustained or not, the Court will not decide the point upon a summary application. If the Plaintiff had a right to bring the action, there seems to be no reason why he may not hold the Defendant to bail, having never before arrested him for the same debt; and whether the action can be sustained or not, is a question of law to be decided on the record.

Rule discharged.

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Nov. 27th.

BIRCH and Another *v.* PRODGER and Another, Bail of D'ERVAL.

An attachment, for non-payment of money to *A.*, having issued against *B.* from this Court, and the process being in the hands of an officer who had not been able to serve *B.* therewith. *B.* was met by *A.* in the street, and carried by violence to the chambers of *C.*, who was *A.*'s attorney, and there detained while the original process was sent for and served upon him; the officer also was sent for (but not by *A.*) and on *B.*'s leaving the chambers of *C.* he was arrested. The Court held this arrest illegal, and discharged *B.*

THIS was an application to the Court, on the part of *Samuel Plaisted*, an attorney of this Court, to be discharged out of the custody of the sheriff of *London*, as having been illegally arrested upon an attachment for non-payment of money.

The result of the affidavits on both sides was as follows: *Plaisted*, having been employed by the Plaintiffs as their attorney, recovered of the Defendants the sum of 743*l.* 12*s.* 4*d.*, and also got into his hands several papers belonging to the Plaintiffs. In consequence of this, *Plaisted*'s conduct being investigated in this Court, he was ordered to pay over the money to the Plaintiffs; for non-payment of which an attachment was issued. The process upon this attachment was put into the hands of one *Shapcott*, an officer, but *Plaisted* kept out of the way, to avoid being served with the attachment. On the 20th of *August*, *Samuel Birch*, one of the Plaintiffs, having met *Plaisted*, in *Salisbury-court*, *Fleet-street*, laid hold of him and served him with a copy of the rule for the attachment, and endeavoured to take him to the chambers of Mr. *Luke Naylor*, *Birch*'s then attorney, in the Temple. On *Plaisted*'s resisting, a mob was collected round him; he was put into a hackney-coach, and carried by force to *Naylor*'s chambers. He was there served with the original rule for the attachment, having been detained some time while *Samuel Birch* sent to his brother *Thomas Birch* for the original rule. Immediately after this, he was dismissed by the Plaintiffs from *Naylor*'s chambers, but had no sooner got down the staircase of those chambers than he was arrested upon the above-mentioned attachment by *Shapcott*, who stated that he had been sent for to make the

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arrest. The Plaintiffs expressly denied being privy to the arrest, and *Naylor* denied being privy to any plan for bringing *Plaisted* to his chambers.

Shepherd Serjt. shewed cause against the rule, contending that as the process was regular, and the conduct of the officer legal, there was no ground for the Court to interfere; and observed that, as the arrest in this case was for a contempt of the Court, which had been considered as amounting to a breach of the peace, it was allowable to use other means for effecting the arrest than might be employed in the case of mere civil process.

Bayley and *Best*, Serjts. *contra*, insisted that as the first detention was illegal, the party was entitled to his discharge, though the process was regular, and no action might be maintainable against the officer if not privy to such illegal detention. They cited *Loveridge* v. *Plaistow*, 2 *H. Bl.* 29. and *Barlow* v. *Hall*, 2 *Anstr.* 461., in both which cases the Defendants were discharged on account of the illegality of the original detention; and observed that there was no authority for making any distinction between the process in this case and any other civil process, and that the only question here, as in the case of *Barlow* v. *Hall*, ought to be whether the process of the Court had not been abused.

Sir JAMES MANSFIELD Ch. J. I do not believe that those who took *Plaisted* to *Naylor*'s chambers had then any idea of arresting him. But the distinction is very nice between carrying a man by force to a place for the purpose of having him arrested, and carrying him there by force for another purpose, and then causing him to be arrested. If *Shapcott* was sent for, it is very much like an arrest by *Shapcott* under a detention at the chambers of *Naylor*, which brings the case very near to those which have

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BIRCH and Another v. PRODGER and Another.

have been cited. We shall take an opportunity of speaking with the other Judges upon the subject, and if they shall be of opinion that *Plaisted* ought to be discharged, an order for that purpose shall be drawn up as of this day. Though the conduct of *Plaisted* has been such as fully deserves the confinement which he has suffered, yet we must not decide this case by any other rule than what would be applicable to all others. Certainly arrests by violence must not be encouraged. They lead to serious consequences. If we should think that the party ought to be discharged notice shall be given, and an order drawn up.

An order was afterwards given to make the rule absolute for the discharge of *Plaisted*.

MILLS *v.* HEAD.

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Where bail have been rejected, the Defendant cannot surrender without putting in fresh bail.

THE Defendant having been arrested in the long vacation upon a writ returnable on the morrow of *All Souls*, bail above were put in on the 9th of *November*, and notice of justification given. The bail being brought up, in pursuance of this notice, were rejected; after which the Defendant surrendered himself, without putting in fresh bail. The Plaintiff upon this took an assignment of the bail bond, and commenced proceedings against the bail to the sheriff.

A rule *nisi* having been obtained for setting aside the assignment of the bail bond, and proceedings thereon,

Best Serjt. shewed cause, and contended that the Defendant's surrender was irregular, there being no bail in existence by whom it could be made.

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Onslow Serjt. *contrà*, insisted that so long as the bail remain upon the bail piece, they are competent to surrender, though rejected. He cited *The King* v. *The Sheriff of Essex*, 5 *T. R.* 633., where, in consequence of an exception to the bail put in, notice was given that two other bail would justify, one of whom was afterwards rejected, after which the Defendant was surrendered, and the master of *K. B.* stated to the Court that there should have been a rule to strike out the two first bail whose names stood on the bail piece; and that until that was done they might surrender the principal. He also read a manuscript note of a case decided in the King's Bench, *East*, 40 *G.* 3. (*a*).

But *The Court*, after referring to the officers, said, That although any bail were sufficient to surrender, yet when rejected they were no bail, and that it was not necessary to obtain a rule to strike them off the bail piece,

Rule discharged.

(*a*) *Anon. May* 24, *E.* 40 *G.* 3. On shewing cause why an attachment against the sheriff, for not bringing in the body, should not be set aside for irregularity with costs, it appeared that the bail surrendered the Defendant on the day when the rule expired, but one bail only had justified, and time had been refused by the Court to justify another.

Espinasse contended that no bail were in Court to make the surrender, that time having been refused to justify the one, made the case the same as if none had been put in. He cited for this *Tidd's* and *Sellon's Practice*.

But *The Court* said (on referring to the Master) Even bail rejected, while on the bail piece, are competent to make a surrender. The books cited are not of themselves to be quoted as authorities.

Rule absolute for setting aside the attachment.

Marryatt for the rule.

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The Defendant has four days, exclusive, from the day of the exception, to justify bail. And if an attachment be obtained on the fourth day, the Court will set it aside, without first calling on the Defendant to justify bail.

THE Defendant, having been arrested upon a writ returnable the first return of this term, put in bail upon the 9th of *November;* on the 13th, the sheriff was ruled to bring in the body; on the 16th, the bail were excepted to; on the 20th, an attachment was obtained; and in the latter part of the same day, the bail were brought up to justify and were rejected.

A rule *nisi* having been obtained for setting aside this attachment,

Cockell Serjt. in the first place insisted that the sheriff was not entitled to move to set aside the attachment, without having first justified bail; and secondly, that the Plaintiff had a right to move for an attachment on the 20th, the rule to bring in the body having expired on the 17th.

Shepherd, Serjt. *contra*, argued that where the objection to the attachment is that it has been moved for too soon, the sheriff is not bound to justify bail before he moves to set it aside; that as bail were put in within time, the Defendant was not bound to justify them, unless an exception were entered, consequently there was no default in the sheriff on the 13th, when the rule to bring in the body issued, and that rule was altogether irregular; and that as the exception was not entered till the 16th, the Defendant therefore was entitled to the whole of the 20th to justify.

The Court thought that the sheriff was entitled to move to set aside the attachment, without having first justified

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tified bail; and that the Plaintiff had no right to move for an attachment until the morning of the 21st, the rule to bring in the body being a nullity.

Rule absolute with costs.

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MILLS *v.* GRAHAM.

In *detinue*, when the goods are alleged to have come to Defendant by finding, it is sufficient for the Plaintiff to prove that the goods came to the Defendant by wrong. At least unless the *finding* be traversed.

THE declaration was as follows. The Defendant was summoned to answer unto the Plaintiff in a plea, that he, the said Defendant, render unto the said Plaintiff certain goods and chattels, to the value of 300*l.* of lawful money of *Great Britain*, which the Defendant unjustly detains from the Plaintiff; and thereupon the Plaintiff, by *R. H.* his attorney, complains for that whereas the Plaintiff, heretofore, to wit, on, *&c.*, at, *&c.*, delivered to the Defendant the goods and chattels following, that is to say, 75 dozen of skins of the said Plaintiff of a large value, to wit, of the value of 300*l.* of lawful money of *Great Britain*, to be redelivered by the said Defendant to the said Plaintiff when he should be thereto requested; nevertheless the said Defendant, although thereto often requested, hath not yet delivered the said goods and chattels, or any of them, or any part thereof, to the said Plaintiff, but hath hitherto refused and still doth refuse to deliver the same to the said Plaintiff, to wit, at, *&c.* And whereas also the said Plaintiff heretofore, to wit, on, *&c.*, at, *&c.*, was lawfully possessed of divers other goods and chattels, to wit, 75 dozen of other skins of a large value, to wit, of the value of 300*l.* of like lawful money, and being so thereof possessed, the said Plaintiff afterwards, to wit, on, *&c.*, at, *&c.* casually lost the

&c.

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the said last-mentioned goods and chattels out of his hands and possession, and the same then and there came to the hands and possession of the said Defendant, who found the same; nevertheless the said Defendant, well knowing the said last-mentioned goods and chattels to be the goods and chattels of the said Plaintiff, and to him of right to belong and appertain, hath not as yet delivered the said last-mentioned goods and chattels, or any of them, or any part thereof, to the said Plaintiff, although often requested so to do, but hath hitherto refused, and still doth refuse to deliver the same to the said Plaintiff, and now unjustly detains the same from the said Plaintiff, to wit, at, *&c.*, whereupon the said Plaintiff saith he is injured, and hath sustained damage to the amount of 300*l.* and therefore he brings his suit, *&c.*

Plea, *non detinet.*

The cause was tried before Sir *James Mansfield* Ch. J. at the *Westminster* sittings in this term, when it appeared that the Defendant, being desirous of purchasing some skins, applied to the Plaintiff to sell him some, which the latter declined, but agreed to let him have skins to the amount of 275*l.* to finish, for the finishing of which the Plaintiff was to pay; that the skins having been delivered accordingly, the Plaintiff afterwards applied to the Defendant to return them, offering to pay any thing that might be due; that the Defendant refused to return them, and again wished to purchase them, offering to pay the price by instalments of 5*l. per* month; that the Plaintiff still refusing to sell them, the Defendant declared that he would contest the matter at law, as he was under age, which was the case. His Lordship was of opinion that the first count of the declaration, which stated a bailment of goods to be redelivered upon request, was not supported by evidence of a bailment for a special purpose, but held, that notwithstanding this infancy of the Defendant, and an objection to the allegation on the second count,

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count, that the goods came to his hands by finding, the Plaintiff was entitled to recover upon that count. Accordingly a verdict was found for the Plaintiff, subject to the opinion of the Court.

A rule *nisi* for a nonsuit having been obtained on a former day,

Shepherd Serjt. shewed cause. Though it was not precisely proved that the goods were lost by the Plaintiff and found by the Defendant, yet the evidence adduced was sufficient to maintain the second count. There is a clear distinction between actions on contract and actions in trover or *detinue;* in the former, the contract is the *gist* of the action; but in the latter, it is not the mode by which the goods come to the Defendant's hands that forms the *gist* of the action, but the conversion in trover and the detention in *detinue*. If the allegation of finding must be precisely proved, almost every judgment which has been given in actions of trover is wrong, for it scarcely ever happens that the property in dispute has actually come to the Defendant's hands by finding. In *Co. Litt.* 286. b. it is said, *Breve de detentione dicitur a detinendo*, because *detinet* is the principal word in the writ, and it lieth where any man comes to goods either by delivery or by finding. So in *Fitzh. Natura Brevium*, 138. (E) it is said, "if a man find my goods which I have lost, I shall have a writ of *detinue* for them." In *Bac. Ab.* tit. *Detinue*, *detinue* is said to be an action which lies for the recovery of goods and chattels, though the party came to the possession of them by lawful means, as by bailment, borrowing, or pledging. In *Kettle* v. *Bromsall*, *Willes*, 118. the Plaintiff declared in *detinue* for certain antiques, and that being possessed thereof, he casually lost the same. The Court thought this a good count in *detinue*, for that *detinue* would lie for things lost and found, as well as for things delivered. And in *Mod. Ent.* vol. 2. p. 422. there

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is a precedent in *detinue* similar to the second count in this case. If it were not sufficient, under a count framed as this is, to prove the particular mode in which the goods came to the Defendant's hands, it would often be necessary to introduce upon the record a length of pleading which would be extremely inconvenient, since it would be necessary to set forth in detail all the particular circumstances which were to be adduced in proof. Under whatever particular circumstances goods may have come to a person's hands, the owner is allowed to declare for them in an action of trover, and as the action of *detinue* may be founded upon an allegation that the goods were lost and found, there seems to be no reason why such a general allegation should not be sufficient in the action of *detinue* as in the action of *trover*, though the goods may in fact have been received under special circumstances.

Best Serjt. in support of the rule. It may be admitted that the action of *detinue* will lie for goods lost and found; but the distinction between *trover* and *detinue* is this, that in the one case it is necessary to state the mode by which the goods came to the Defendant's hands, and in the other it is not. In *trover*, the conversion is the *gist* of the action, and if that be proved, it is sufficient. The action of *trover*, says Lord *Mansfield* in *Cowper* v. *Chitty*, 1 *Bur.* 31. is in form a fiction, in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. But the case is very different in *detinue*, for the goods may be detained, and rightly detained; but the goods of another can never be rightly converted; and whether goods have been wrongfully detained or not must depend upon the circumstances under which they came to the Defendant's hands. From the variety of precedents in *detinue*, which are to be found in the books, it is evident that it has always been considered necessary to state particularly the mode in which the Defendant

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fendant received the goods. In *Mod. Entr.* 427, 428, there are many precedents; one chapter is entitled, Of goods delivered to be safely kept; another, On finding; and a third, Of goods bought. In *detinue* of charters by an heir at law, he must count of the certainty of the lands, and how they were conveyed to him. 2 *Mod. Entr.* 424, *b*. The case of *Kettle* v. *Bromsall* is no authority for the Plaintiff here, that being upon demurrer, and the only question was, whether the count upon a finding was a good count in *detinue*, which is not now denied. Nor is the objection well founded, that the rule now contended for would render a great length of statement necessary, where the goods have come to the Defendant's hand in a circuitous mode. For if they come to him by a third person, the receipt may well be described as a finding, since they could not be bailed to him by such third person. But here it appears upon the evidence for the Plaintiff himself, that the goods were delivered to the Defendant in a special manner, which does not agree with the averment in the declaration.

Sir JAMES MANSFIELD Ch. J. The question now is, Whether the evidence given at the trial was such as to maintain the last count of the declaration? and it seems to me that it was. The Plaintiff indeed delivered the skins to the Defendant to be finished; but this delivery was founded upon the supposition that he was treating with a man who was capable of treating with him. Being for some reasons desirous to have his goods again, he applies to the Defendant, who refuses to return them, not on the pretence that they were delivered for a special purpose, but he offers to buy them and pay for them at 5*l.* *per* month; and when this is declined, he says, that he is under age, and will contest the matter at law. Then what was the contract between the parties? On the part of the Defendant, there was none. The contract being

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being incomplete, on account of the minority of the Defendant, the case is totally different from those which have been founded upon a bailment. A bailment of goods to be redelivered imports an agreement to redeliver; all special bailments import a contract to redeliver, when the purpose for which the goods were deposited is answered. But in this case, for want of a capacity in the Defendant to make a complete contract, no bailment was made. This being the case, the action is brought in *detinue* instead of trover. Now there can be no doubt that trover might have been brought on the conversion. For the reasons already stated, I do not see how the goods could be in the Defendant's hands under what the law calls a bailment. He first fraudulently received them, concealing the circumstances of his minority, and then fraudulently set up his minority as a defence against the Plaintiff's just demand. The goods being wrongfully in the Defendant's hands from the beginning, without any valid contract between him and the Plaintiff, it seems to me that they must be considered in the same situation as if the Defendant had at first wrongfully gotten possession of them without pretence of bailment. If that be so, what objection can there be to the Plaintiff's recovery upon the second count? It is not disputed that a count in *detinue*, framed upon a supposed finding, may be supported if the goods are wrongfully in the Defendant's possession. Without going further, it appears to me that the second count was supported by the evidence given; and it will therefore be unnecessary to comment upon the doctrine in the cases which have been mentioned. At the same time, it may be observed that no case has been cited to prove that where the detention is wrongful the declaration may not always be supported upon an allegation of finding: though perhaps in cases of special bailments, it may be fit to require that the Plaintiff should declare specially, yet I will not say that it is necessary even in these cases.

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cases. In *trover*, the Plaintiff always alleges a finding; but never proves it; and from the very nature of the thing, it is often incapable of proof. A wrongful conversion, or a wrongful detainer after demand, is considered as evidence of finding; and I can see no reason for making a distinction between an allegation of finding in an action of *trover*, and such an allegation in an action of *detinue*. If the allegation were strictly true, it could scarcely ever be proved in either case, unless the Defendant had himself acknowledged the finding. Besides, if the allegation of a particular bailment is material, it is also traversable. But the plea of the Defendant here is, that he does not detain in manner and form as the Plaintiff has alleged. This does not apply to the finding. But without professing to decide this point, it is sufficient to say, that the goods did not come to the Defendant under what could properly be called a bailment. They came into his hands by fraud. And the right of the Plaintiff must be considered just the same as if the goods had come to the Defendant's hands without pretence of right or delivery.

HEATH J. I am of the same opinion. I think there is much weight in what has been said respecting special bailments, and perhaps in such cases the special delivery ought to be declared upon, and may be traversed.' But here the goods came into the Defendant's possession by wrong. If, therefore, it was necessary to declare specially, it would be necessary to set out all the evidence, but there is no ground for contending that, and it would be attended with great expence. It is true, that in *detinue* by an heir at law for charters, it is not sufficient for him to say that he was possessed of them; his right, however, is not a personal right, but a right arising from the land; it is necessary therefore for him to set out his right as heir.

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ROOKE J. The declaration itself is admitted to be good, and the only question is upon the proof. Now the allegation is either material or it is not. If it be material, it ought to be traversed, in order to be put in issue; and if it had been put in issue, I should have inclined to think it had been proved in this case; for the goods did not come to the Defendant's hands by contract; and if they came by wrong, I do not think it very material whether they came by actual finding or were obtained by fraud. But whatever might have been the case if the finding had been put in issue, I am of opinion that the evidence supports this declaration.

CHAMBRE J. The action of *detinue* is as old as any action known to the law, and yet it is rather extraordinary that the subject of objection in the present case has never been brought into question. Many cases might be put to which an action of *detinue* could not apply, unless this general mode of declaring were allowed. Only three modes of stating the inducement appear by the entries to have been used. One is on a bailment, another on finding, and a third on purchase. But the precedents do not comprehend half the cases which might arise. Suppose a bailment were made to *A.*, and that the goods, after passing through several hands, come into the hands of *B.* Could it be necessary to trace the progress of the goods through all the hands into which they had passed? In this case, I believe that the practice has been to declare upon a finding, as has been done in the present case. I am not certain that the finding has not been literally proved in this case: for it is not clear that the word finding is to be confined to the sense of picking up a thing which has been casually lost. The form of proceeding in *trover* is very material on this point, and seems to warrant us in considering the finding merely as inducement. To the present

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present day, no case has ever arisen in which it has been thought necessary, upon the plea of *non detinet*, to prove precisely the finding alleged. This mode of declaring seems to be adapted to cases the proof of which is difficult. Whether a special bailment ought to be set forth or not, and whether such bailment might be traversed, I will not say; but I am far from saying that it might. But if it might, issue must be taken accordingly. With respect to declarations by an heir at law, it is true that the Plaintiff must give such a description of the goods as to shew that they belong to him as heir; and it may be required that he should shew how he is heir, and that the deeds relate to the lands of which he is heir. But here I entirely concur in thinking that sufficient proof has been given to entitle the Plaintiff to recover.

Rule discharged.

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Ex parte ANN KNEE.

The mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it.

THIS was an application for an *habeas corpus* to bring up the body of an infant illegitimate child, in order to restore it to the mother. It appeared by the affidavits, that the child had been placed by consent of the father and mother under the care of a nurse; that it was afterwards removed by the father to another woman; that the father then went abroad, having entrusted Mr. *Brandon*, a friend, with the superintendance of the child; that Mr. *Brandon* (to whom the writ was prayed to be directed) wished to have the child placed with some person where the mother could

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could have access to the child, and under those circumstances was willing to pay for its maintenance, but the mother insisted upon having it delivered up to her.

The child being brought up, and the mother being present,

Shepherd Serjt. shewed cause, and urged that it would be for the benefit of the child that it should be placed with some person whom the father might approve, as the father, from his situation in life, was better able to maintain the child than the mother.

Best Serjt. *contrà*, insisted upon the right of the mother to the custody of her own child, and referred to *The King* v. *De Manneville* 5 *East*, 221., and *The King* v. *Moseley* 5 *East*, 224. in notis, and *The King* v. *Soper*, 5 *T. R.* 278.

Sir JAMES MANSFIELD Ch. J. There is no affidavit before the Court to shew any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely indeed that by granting this application we may be doing a great prejudice to the child, but still the mother is entitled to the child if she insists upon it. The application in this case may have arisen from pure affection, and the mother may be disposed to take care of the child, but it is not probable that it will be so advantageously brought up under her care as under the care of some person whom the father approves of. It often happens that the mother insists upon the custody of the child, not so much out of regard to the child itself, as with a view to make the father pay a sum of money towards its maintenance and education. Nevertheless

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the mother must have the child unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother.

Accordingly, the other Judges being of the same opinion, the child was delivered to the mother in Court.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Forty-fifth Year of the Reign of GEORGE III.

LITTLEDALE and Others, Assignees of KENYON, a Bankrupt, *v.* DIXON. *Jan.* 23d.

THIS was an action upon a policy of insurance on board the *Cumberland*, at and from *Barbadoes* to *Liverpool*.

The cause was tried before *Chambre* J. at the *Guildhall* sittings after last *Trinity* term, when it appeared that the policy was effected at *Whitehaven*, in consequence of a letter of orders written by a broker at *Liverpool*, on the 8th day of *January*, in which he said, "The *Cumberland*, we expect, will have taken her departure from *Barbadoes* on the 26th of *November*. The *Barton*, sailed on the 24th, and arrived at *Liverpool* on *Sunday* last (5th of

In effecting a policy on the 8th *January* at *Whitehaven*, on a ship "at and from *Barbadoes* to *Liverpool*," a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer; was expected to have sailed on the 28th *November*; and that the *Barton*, a coppered vessel and very fleet, which had sailed the 24th from *Barbadoes*, had arrived on the 5th *January*, but no notice was taken of the *Agreable*, another coppered and fleet vessel, which sailed the 29th *November*, having also arrived on the same day as the *Barton*. After verdict for the Plaintiff the Court refused to grant a new trial on the ground of concealment.

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January), but she is coppered and a remarkably fleet vessel;" that another ship, called the *Agreable*, which left *Barbadoes* on the 29th of *November*, had also arrived at *Liverpool* on the 5th of *January*, but that she also was coppered and a remarkably fast sailor; that an entry of the arrival of both these vessels, on the 5th of *January*, had been made in the broker's book at *Liverpool*; that the *Cumberland* was not coppered, and was full built, and a slow sailer; and was not considered as a missing ship at the time when the letter of orders was written; and it was sworn by a witness for the Plaintiff that the knowledge of the arrival of the *Barton* and *Agreable* could not vary the premium. The loss being proved, a verdict was found for the Plaintiffs.

Shepherd Serjt. now moved for a rule *nisi* to set aside this verdict and have a new trial, insisting that the broker had concealed a material circumstance in omitting to state the arrival of the *Agreable*, with which he was acquainted; and that the terms of his letter were equivalent to an assertion that the *Barton* was the only ship which had arrived.

Sir JAMES MANSFIELD Ch. J. The sole question, as it seems to me, and which the jury alone was capable of deciding, was whether the arrival of these two ships could be a ground for considering the *Cumberland* as out of time. On this point, this Court cannot overturn the opinion of the jury. It is not because one or two ships had arrived three days before the insurance was ordered, that the *Cumberland* was to be considered as a missing ship. The witness states, that if the underwriters had been informed of the arrival both of the *Barton* and *Agreable*, it would not have made a difference in the premium. Is there any case in which the single circumstance of the arrival of two ships has been considered as a matter neces-

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sary to be disclosed? The jury having decided upon the evidence before them, we ought not to disturb their verdict.

HEATH J. of the same opinion.

ROOKE J. There is no doubt of the general proposition that every material circumstance must be disclosed, but it was for the jury to say how far the circumstance in question was material; and as they have decided upon it, what ground have we to say that they have done wrong?

CHAMBRE J. I was satisfied with the verdict. I left it to the jury to determine whether the broker had fraudulently suppressed the arrival of one ship when he communicated the arrival of the other.

Shepherd took nothing by his motion (*a*)

(*a*) Vide *Willes* v. *Glover*, *ante* p. 14.

JEFFERIES *v.* WATTS. *Jan.* 27th.

If a Defendant reside in *Middlesex*, and keep a warehouse within the city of *London* jointly with another, but after the commencement of an action against him for a small demand, tell the Plaintiff that he does not keep the warehouse in question, and the Plaintiff, upon inquiry in the neighbourhood of the warehouse, can obtain no intelligence respecting the Defendant, the Court will not, under the 39 & 40 *G.* 3. *c.* 104., exempt the Defendant from payment of costs on the ground of the verdict being under 5*l.*, and that he ought to have been summoned to the court of requests.

THIS action was brought to recover the sum of 2*l.* 12*s.* 6*d.* for the cartage of a quantity of rags from the *Tower* to *Martin's-lane*, *Cannon-street*, in the city of *London*. A verdict having been found for the Plaintiff, a rule was obtained calling on the Plaintiff to

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shew cause why the Defendant should not be exempted from the payment of costs, pursuant to the 39 & 40 *G.* 3. *c.* 104. *s.* 5. and 12. (public local), on the ground of the cause of action having arisen within the jurisdiction of the court of requests, and the Defendant's liability to be summoned to that court. It appeared that the rags had been carried by the Defendant's order to a warehouse in *Martin's-lane, Cannon-street;* that a short time after the action was brought, the Defendant told the Plaintiff that he was not bound to pay for the carriage of the goods, as the goods and warehouse in *Martin's-lane* belonged to a person of the name of *Juda.* This person was called as a witness at the trial, but instead of proving that the goods and warehouse belonged to him alone, he swore that he and the Defendant carried on business as rag merchants at the warehouse in *Martin's-lane*, under the name of *Watts* and Company. This application was made to the Court upon an affidavit, stating that the Defendant, together with the said *Juda*, kept a warehouse in the city of *London*, under the firm of *Watts* and Company, before and since the commencement of the action. On the part of the Plaintiff, it was sworn that the Defendant lived in the parish of *St. George's*, in the county of *Middlesex*, and kept a shop there; that the Plaintiff did not know, at the time when the action was commenced, that the Defendant was concerned in the warehouse at *Martin's-lane;* and that upon inquiry in the neighbourhood, no intelligence could be obtained of any person of the name of *Watts*.

Cockell Serjt. shewed cause, and insisted, that notwithstanding the affidavit of the Defendant, and the proof at the trial, that the Defendant was interested in the warehouse in *Cannon-street*, yet as that circumstance was not known to the Plaintiff, nor indeed publicly known at all, the Plaintiff ought not to be deprived of his costs, especially

especially as the Defendant himself had, before the trial, stated that the warehouse belonged to *Juda*.

Vaughan Serjt. *contrà*, argued that the statute left no discretion in the court; that the Defendant's residence in *Middlesex* could make no difference, the words of the statute being positive, "that all persons keeping any warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading, or dealing within the city, should be summoned to the court of requests for any debt under 5*l.*," and that as it now distinctly appeared that the Defendant did keep a warehouse, and carry on business, in the city of *London*, he was entitled to the benefit of this application.

Sir JAMES MANSFIELD Ch. J. The *39 & 40 G. 3.* appears to me to be an act equally beneficial to Plaintiffs and Defendants, as it is calculated to save expence; but I think it unfortunate that the right to costs is not left to be decided by the certificate of the judge at the trial, to whom all the circumstances of the case must of course be best known. The act seems indeed to be rather loose in its directions how this question is to be determined. The object seems to have been to compel creditors to summon their debtors to the court of requests for debts under 5*l.*, whenever such debtors keep shops in the city of *London* at which the creditors may summon them. But unless the act be construed to mean such a keeping of a shop or warehouse as may be known to the creditors, a creditor might often be placed under great difficulty. The question then is, Whether the Defendant in this case so kept the warehouse in *Martin's-lane* that the Plaintiff might reasonably be supposed to know it. It often happens that several persons carry on business together, where, by agreement, the house is to belong to one of them only, and the others may be little known. Here *Watts* resided

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sided in *Middlesex*, and carried on business there; he does not state how long he had carried on business in *Martin's-lane*, or that it was known to any one person in the neighbourhood. In common cases, a general affidavit might be sufficient; but here the defence first intended to be insisted upon at the trial was that the warehouse belonged to *Juda* only, and that the Defendant himself insisted upon this circumstance as a ground of excuse from being liable to the debt. That being so, there is an end of any right in the Defendant to insist upon the benefit of this act. The Plaintiff was of course ignorant of the Defendant's liability to be summoned to the court of requests, and the Defendant himself misled him by his conversation. Upon the whole therefore, I do not think it made out that the Defendant so occupied this warehouse as to entitle him to the privilege which he claims.

HEATH J. I am of the same opinion.

ROOKE J. Without going particularly into the case, in which I entirely concur with my Lord Chief Justice I will only say, that not only must the fact exist that the Defendant kept a warehouse in the city of *London*, but that fact must be known, and I am not satisfied that it was known in the present case.

CHAMBRE J. My opinion rather differs from that of my Lord Chief Justice, and my Brothers, for I think the act of parliament has said what shall be sufficient evidence of notoriety. It does not appear to me that the party, is bound to give notice of his keeping a shop or warehouse; but that having such a place, and using it as a place of dealing, is alone sufficient to bring him within the act. A man who keeps a stall or stand does not always put his name upon a board; many trades are carried on in that way, and if a party so deals, he is within the

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the act. This act leads to many inconveniences and much expence, which was not foreseen; for instead of directing that the jury should find the fact of residence, the party is obliged to proceed by suggestion which is traversable, and may lead to another trial to try that fact. In the present case, the affidavit of the Defendant states that he kept a warehouse in *Martin's-lane*, and there carried on trade; this is in the usual course, and all that is required. But the ground on which it strikes me that we may refuse this application is, that it appears from the Plaintiff's affidavit that he was misled by the declaration of the Defendant, which seems to me to amount to a waver of his right; and it is more upon this ground than the other that I concur in thinking the rule should be discharged.

Rule discharged.

DAVISON *v.* MARCH.

Jan. 30th.

An Affidavit to hold to bail, which stated the Defendant to be indebted to the Plaintiff as indorsee of a bill of exchange, without alleging the bill to have become due, was held sufficient.

CLAYTON Serjt. was called upon to support a rule *nisi* for discharging the Defendant on a common appearance, on the ground of the affidavit to hold to bail being defective. The objection was, that it stated the Defendant to be *indebted as indorsee of a bill of exchange*, without alleging the bill to have become due.

Best Serjt. *contrà*.

The Court was of opinion that the affidavit was sufficient, and that the Plaintiff might be indicted for perjury if the bill was not due, inasmuch as the Defendant would not, in such case, be indebted to the Plaintiff as sworn.

Rule discharged.

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Feb. 1st.

CHRISTOPHER ANDREW *v.* THOMAS PEARCE, Executor of P. BEST.

If tenant in tail male demise for a term of 99 years, and his lessee assign over to another, but before such assignment tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it.

COVENANT. The declaration stated, that by indenture, dated the 25th of *February* 1764, *P. Best*, the Defendant's testator, demised to one *John Garland* and his assigns a certain messuage and tenement, commonly know by the name of *Lower Bofindle*, in the county of *Cornwall*, for the term of 99 years, at the yearly rent of 4*l. per annum*, covenanting that he, the said *P. Best*, at the time of the grant and demise, had in himself good, right, and lawful and absolute authority to grant and demise the said premises; and also for the quiet enjoyment of the said *John Garland*, his executors, administrators, and assigns, during the said term, without the let, hindrance, molestation, or denial of him the said *P. B.*, his heirs and assigns, and of all and every other person whatsoever; that, by virtue of the said demise, the said *John Garland*, on the 25th of *February* 1764, entered into the said premises and became possessed thereof, and that afterwards, viz. by deed of the 22d of *June* 1791, he assigned to one *John Bennett*, his executors, administrators, and assigns the said demised premises for the residue of his, the said *John Garland*'s, term therein; that *John Bennett* accordingly entered, and afterwards, viz. by deed of the 2d of *November* 1801, assigned to the Plaintiff, his executors, administrators, and assigns the said premises for the remainder of the said term then to come and unexpired; that the Plaintiff accordingly entered and was possessed thereof until ejected therefrom. The declation then alleged, "that the said *P. Best* deceased, at the time of making the said indenture of lease, had not, nor had he, at any other time whatsoever, any right or title to the said demised premises, with the appurtenances,

or

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r any part thereof, in him, the said *P. Best* deceased, in his life time, or any authority whatsoever whereby, or by virtue whereof, he, the said *P. Best* deceased, might or could lease or demise the said demised premises, or any part thereof, with the appurtenances, or any part thereof, to the said *John Garland*, to hold the same, or any part thereof, to him the said *John Garland*, his executors, administrators, or assigns, from the said 24th day of *February* 1764, for, and during, and unto the full end and term of 99 years from thence next ensuing, and fully to be complete and ended; and that after the making of the said demise by the said *P. Best* deceased, and after the said Plaintiff became such assignee of the said demised premises as aforesaid, and during the continuance of the said term, to wit, on the 1st day of *January*, in the year of our Lord 1802, at *Bodmin* aforesaid, in the county of *Cornwall* aforesaid, the said *Thomas Pearce* became and was lawfully and rightfully entitled to have and enjoy the immediate possession of the said demised premises, with the appurtenances, under and by virtue of a title thereto, in opposition to the said title of the said Plaintiff to the possession thereof; and the said *Thomas Pearce* being lawfully and rightfully entitled to the said immediate possession of the said demised premises, with the appurtenances of the said *Thomas Pearce*, afterwards and whilst the said Plaintiff so was in possession of the said demised premises, with the appurtenances, and before the expiration of the said term of 99 years thereof demised by the said *P. Best* deceased as aforesaid, to wit, on, *&c.*" proceeding to state an ejectment for the premises by *T. Pearce*, and judgment against the present Plaintiff, and writ of possession in consequence; and coucluding that the said *P. Best* deceased, in his life time, and the said *T. Pearce*, executor as aforesaid, since his death had not kept their covenant with the Plaintiff since he became

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assignee of the covenant made by the said *P. Best*, in his life time, with the said *John Garland* and his assigns.

The Defendant pleaded, "that the said *P. Best*, mentioned in the said declaration, at the time of making the said indenture of demise therein mentioned, and from thence until and at the time of his death hereinafter mentioned, was seised in his demesne as of fee tail male of and in the said tenements, with the appurtenances, mentioned in the said declaration, and in the said indenture of demise, that is to say, to him and the heirs male of his body lawfully issuing, and being so seized thereof, he, the said *P. Best*, afterwards and before the making of the said supposed indenture of assignment between the said *John Bennett* and the said Plaintiff, also mentioned in the said declaration (to wit), on the 4th day of *June* in the year of our Lord 1794, at, &c. died so seised of such his estate of and in the said tenement with the appurtenances without heir male of his body lawfully issuing; and so the said Defendant says that before the making of the said indenture of assignment between the said *John Bennett* and the said Plaintiff (to wit), on the said 4th day of *June* in the said year of our Lord 1794, upon the death of the said *P. Best*, the said term of years in the said tenements, with the appurtenances, granted by the said indenture of demise mentioned in the said declaration, and the estate and interest of the said *John Bennett* in the same tenements, ceased, and became and were wholly void, ended, and determined." To this plea the Plaintiff demurred, and the Defendant joined in demurrer.

Lens Serjt. in support of the demurrer. Whether the term of years became absolutely void or only voidable upon the death of *Peter Best*, still his executor is liable, under the covenant, to make a compensation to the Plaintiff for having the term taken away from him before its

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its natural expiration. It will be said that as the term was at an end upon the death of *Peter Best* nothing passed to the Plaintiff, and he is not assignee. But I contend that the Defendant is *estopped* from setting up that by way of answer which is the ground of complaint. *P. Best* covenanted that he had a right to demise for 99 years, and the plea amounts to nothing more than stating a fact to have happened, which shews that the title was defective. An indenture of demise estops both parties from saying any thing contrary to the demise; thus in *Palmer* v. *Ekins*, 2 *Lord Raymond* 1550., which was an action of covenant for rent, it was determined that the lessee could not plead that the lessor before the demise had conveyed away the premises in fee, for that such plea only amounted to *nil habuit in tenementis*, and that the assignee might take advantage of the estoppel as well as the lessor himself.

Praed Serjt. *contrà*. It is admitted that the term of years became void upon the death of the tenant in tail; the only question therefore is, Whether the executor be bound by the estoppel? Where an interest passes by the indenture of lease, and that interest afterwards determines, the estoppel ceases. Thus it is said in *Co. Litt.* 47. b. "If *A.*, lessee, for the life of *B.*, make a lease for years by indenture, and after purchase the reversion in fee, and *B.* die, *A.* shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest and determined by the death of *B.*" In the case of *Brudnell* v. *Roberts*, 2 *Wils.* 143, which was an action of covenant by the Plaintiff, as heir in reversion in fee to his father, who was the lessor, against Defendant, who was the lessee, the Defendant pleaded that the father was only tenant for life and that the lease determined at his death, and traversed that the reversion belonged to him. The Court agreed with the counsel for the Defendant, that during the life of the lessor the Defendant would have been

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been estopped, but he being dead, and the lease thereby at an end, the lessee was as it were unmuzzled, and not estopped to plead the truth. This doctrine is also clearly laid down in *Treport*'s case, 6 *Rep.* 15. a., where the Plaintiff having declared upon a lease by *A.* and *B.*, and it appearing that *A.* was tenant for life, remainder to *B.* in fee, and that both joined in the indenture of lease, and that *A.* was still alive, it was resolved that it was the lease of *A.* during his life, and the confirmation of *B.* and after the death of *A.*, the lease of *B.*, and the confirmation of *A.*, and it was adjudged against the Plaintiff, for it was said that though the lease was by indenture, it should be no conclusion, for when the deed doth nothing enure by passing of an interest, it shall not be taken to be any conclusion no more than the lease for years of lessee for life by deed indented shall be an estoppel after his death. This doctrine is further confirmed in *Blake* v. *Foster*, 8 *T. R.* 487.

On this day the opinion of the Court was delivered by,

Sir JAMES MANSFIELD, Ch. J. This is an action of covenant, and the declaration states that *Peter Best* in 1764 demised the premises in question for 99 years to *John Garland*, and covenanted that he had good right to make such demise, and that *Garland* should quietly enjoy the premises during the said term; that *Garland* in 1791 assigned to *Bennett*, and *Bennett* in 1801 assigned to the Plaintiff, who was ejected by *Thomas Pearce* unde a title superior to that of *Peter Best*. The plea states that *Peter Best*, at the time of the demise, was seised of the premises in tail male, and, before the assignment by *Bennett* to the Plaintiff, died so seised without heirs male of his body, whereupon the term of years ceased and determined. Upon these pleadings, it is clear that *Peter Best* had no power to make a demise of these premises to continue for 99 years if he should die without issue male; but that it was a good lease so long as he should live, and he might have

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have lived till the end of 99 years. On this demurrer every fact is admitted; it is clear therefore that at the time when *Bennett* assigned to *Andrew*, *Bennett* had no interest in the premises; the lease is stated to have become absolutely void by the death of *Peter Best* without heir male. The lease then having become absolutely void, what could be the operation of the assignment by *Bennett* to *Andrew?* He could neither assign the lease nor any interest under it because the lease was gone. What right of any sort had *Bennett?* If any thing, it could only be a right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently there is no ground upon which the present action can be maintained, and therefore judgment must be given for the Defendant.

Judgment for the Defendant.

STEPHEN LUFFKIN and Others, Executors of JOHN LUFFKIN, *v.* THOMAS NUNN Esq. and JOHN HANSON Esq.

Feb. 4th.

THE Lord Chancellor sent the following case to the Court of Common Pleas. On the 28th of *February* 1795, *Elizabeth Hotchkin*, widow (who is still alive), was

A copyholder demised his copyhold to *J. S.* to hold for one year, and at the end thereof, from year to year, for 13 years more, in all 14 years, if the lord would grant licence, but so as not to create a forfeiture, and covenanted that the lessee should quietly enjoy during the term aforesaid; and the lease contained many covenants and provisoes applicable only to a lease for several years. After the expiration of the first year, the copyhold was purchased by the lord, and surrendered to a trustee for him; who immediately gave a regular notice to quit to *J. S.*, no licence to let having been obtained. Held that, upon the expiration of the notice, the trustee might maintain an ejectment; and that no action would lie on the covenant for quiet enjoyment. Though the contents of the lease were know to the lord before he completed his purchase, and though the covenant of vendor against incumbrances contained an exception of the subsisting lease under which the tenants then held.

tenant

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tenant for life of a messuage, tenement, and farm of about 51 acres, called *Blagg's Farm*, situate at *Great Bromley* in *Essex*, and holden at a small annual quit-rent by copy of court roll at the will of the lord, according to the custom of the manor of *Great Bromley* and the Defendant *Hanson* was before then, and still is lord of that manor. The case then set forth *verbatim* an indenture made on the 28th of *February* 1795, between *Elizabeth Hotchkin* and *John Luffkin*, whereby *Elizabeth Hotchkin* demised, granted, and to farm let unto the said *John Luffkin*, his executors, and administrators all that messuage or tenement and farm, together with all houses, &c. and appurtenances in *Great Bromley*, commonly called *Blagg's Farm*, then in the occupation of the said *John Luffkin*, his under-tenants or assigns, with a reservation of all timber and underwood, and liberty of ingress and egress to the said *Elizabeth Hotchkin* and her assigns, and the next immediate remainder-man or reversioner, to have and to hold the said messuage, tenement, and farm, with the lands and appurtenances thereunto belonging, unto the said *John Luffkin*, his executors, and administrators, from the 29th day of *September* 1794, for and during the full end and term of one whole year from thence next ensuing, and fully to be complete and ended, and at the end of the said term of one year, from year to year, for and during the term of 13 years more, in all 14 years, if the lord or lords, lady or ladies of the manor or manors of whom the said demised premises are holden will give licence and consent, and so as the same or any part or parcel thereof shall not become forfeited or liable to be forfeited, yielding and paying therefore, yearly and every year during the said term, unto the said *Elizabeth Hotchkin* and her assigns, for so long time as she the said *Elizabeth Hotchkin* shall live, and from and immediately after her decease unto such person or persons to whom the next immediate remainder or reversion of the same premises shall for the time being belong,

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belong, the yearly rent or sum of 42*l.* of lawful money of *Great Britain*, on the two most usual feast days or times of payment in the year (that is to say), the feast days of the *Annunciation of the Blessed Virgin Mary* and *St. Michael the Archangel*, by equal and even portions, the first payment to begin and be made on the feast day of the *Annunciation of the Blessed Virgin Mary* next ensuing the date of these presents. Proviso for re-entry if the rent shall be in arrear 28 days, or if *John Luffkin* shall assign the lease, or demise or part with the occupation of the premises without the licence in writing of *Elizabeth Hotchkin*, or her assigns, or the next remainder-man, or reversioner, or if he shall commit waste or make breach of all or any of the covenants. And the said *John Luffkin* covenants to pay the rent during the said term to *Elizabeth Hotchkin*, or her assigns, and also all rates and taxes, and also at all times, during the said demise, to maintain and keep the messuage, barns, *&c.* in tenantable repair, with thatching, daubing, and glazing, and to keep in like repair the gates, fences, *&c.* being allowed rough timber, and at the end or other sooner determination of the said demise quietly to surrender the premises so repaired to *Elizabeth Hotchkin*, or her assigns, or the next remainder-man or reversioner; and also to spend upon the premises all manure, hay, and straw which shall arise during the demise; and further, that he will not during the demise plough above 40 acres of the land, nor take two crops of grain successively from any part thereof without summer tilling (turnips and clover, pease and beans, if well hoed and kept free from weeds, not to be deemed a third crop), nor would fell any timber, or trees likely to become timber, under a penalty of five pounds a tree to *Elizabeth Hotchkin*, and her assigns, or the next remainder-man or reversioner, nor assign the lease, or any part of the premises, or part with the occupation thereof, or any part thereof, without licence obtained as aforesaid.

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said. And moreover that *John Luffkin*, his executors, and administrators will, in the last year of the demise, make and leave, and in an husband-like manner, ten or twelve acres of fallow land upon some part of the premises, being allowed for the same according to the custom of the country, and will permit the succeeding tenant to enter thereon in *July*, and permit *Elizabeth Hotchkin* to sow clover and grass seeds in the last year of this demise at the same time the said *John Luffkin*, his executors, or administrators shall sow soft corn; and that he will not take any wood for firing, except what arises on making the fences, and the lops of trees for stakes which shall be spent upon the premises. And the said *Elizabeth Hotchkin*, for herself and her assigns, and the next remainder-man or reversioner, covenants to keep in tenantable repair the messuage, barns, *&c.* glazing, daubing, and thatching only excepted, and to allow to *John Luffkin*, his excutors, and administrators for the fallows out of the last half year's rent, according to the custom of the country; and in case rough timber shall not be assigned, on notice of fifteen days, will permit him or them to take the same, and also will permit him or them to use the barn for thrashing, and a piece of ground to fodder his cattle till *Lady-day* next after the expiration of the demise; and that he, the said *John Luffkin*, his executors, and administrators, paying the above reserved yearly rent, and performing and keeping all other the covenants and agreements hereinbefore contained, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the abovementioned to be demised premises, with the appurtenances, *for and during the term aforesaid*, without the let, suit, trouble, denial, or disturbance of the said *Elizabeth Hotchkin*, or her assigns, or of the person or persons to whom the next immediate remainder or reversion of the same premises shall for the time being belong, or of any other person or persons by her or their means, consent,

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consent, or procurement. And lastly, it is hereby mutually agreed by and between the said parties to these presents, and the said *John Luffkin* doth hereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said *Elizabeth Hotchkin* and her assigns, and to and with the person or persons to whom the next immediate remainder or reversion of the same premises shall, for the time being, belong, that he, the said *John Luffkin*, his executors, administrators, and assigns shall and will, in case the said *Elizabeth Hotchkin*, or *Joseph Buckeridge* (at present the next immediate person in remainder or reversion), or either of them, shall be minded or desirous, at any time or times during the said term hereby demised, to possess or enjoy all or any part of the premises hereby demised for her or his own actual occupation, or for the purpose of building on, and do and shall give unto the said *John Luffkin*, his executors, administrators, or assigns 12 months' previous notice in writing of such her or his intention, leave, surrender, and yield up into the hands of the said *Elizabeth Hotchkin*, or the said *Joseph Buckeridge*, all and every, or any such part of the said premises hereby demised as shall in the said notice, so to be delivered, be specified and declared, she, the said *Elizabeth Hotchkin*, or the said *Joseph Buckeridge*, paying unto the said *John Luffkin*, his executors, administrators, and assigns such sum or sums of money, as a compensation for the giving up of the said premises, or any part thereof, as two persons, one to be chosen by each party, shall adjudge as a reasonable satisfaction for the same; and in case of such two persons not agreeing, then such sum or sums of money as shall be agreed by a third person, to be chosen by such two persons not agreeing. And the said *Elizabeth Hotchkin* for herself, her executors, and administrators, doth covenant, promise, and agree to and with the said *John Luffkin*, his executors, administrators,

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strators, and assigns, that in case the said *Elizabeth Hotchkin*, or the said *Joseph Buckeridge*, shall be so minded and desirous of taking all or any part of the premises hereby demised for the purposes aforesaid, and do and shall give and leave to and for the said *John Luffkin*, his executors, administrators, and assigns such notice as aforesaid, that then, and in such case, she, the said *Elizabeth Hotchkin*, or the said *Joseph Buckeridge*, shall and will pay unto the said *John Luffkin*, his executors, administrators, and assigns, all such sum and sums of money as the said arbitrators, so to be chosen, or in case of their differing, the said umpire, shall adjudge to be a reasonable compensation for the giving up all, or any part of the said premises, by the said *John Luffkin*, his executors, administrators, and assigns. In witness whereof, *&c.*

The indorsement upon the above deed, which is in the same hand writing as the deed itself, is as follows:

Mrs. *Elizabeth Hotchkin*, Widow, to Mr. *John Luffkin*	Lease of a farm at *Great Bromley*, from *Michaelmas*	1794
	Term -	14
	Expiring *Michaelmas*	1808
	Yearly Rent	£42 0 0

No licence for this lease was obtained from the lord of the manor within the year, but the lessee entered, by virtue of the said lease, immediately after the execution thereof, and continued possessed of the said premises, without any new demise, till *August* 1801, when he died, having made his will, and appointed the Plaintiffs his executors, who regularly took probate, and have remained in possession ever since their testator's decease. The Defendant

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fendant *Hanson* having, on the 18th of *September* 1801, contracted, as well with Mrs. *Hotchkin* as with Lieutenant Colonel *Buckeridge* the reversioner, for the purchase of the beforementioned messuage, tenement and farm, together with 15 acres of other land, partly freehold and partly copyhold, of the same manor, in the occupation of one *John Cowell*, under a lease from Mrs. *Hotchkin* with a similar *habendum*, they, by Mr. *Hanson*'s direction, on the 10th *February* 1802, surrendered *Blagg's Farm* to the use of the Defendant *Nunn*, his heirs, and assigns, and Mr. *Nunn* was on the same day admitted as tenant thereof upon the court rolls. The purchase-money was paid by Mr. *Hanson*, for whom Mr. *Nunn* is merely a trustee. At the time when Mr. *Hanson* agreed for the purchase, a written contract was made containing an exception of all subsisting leases (if any there were), but before the payment of the purchase-money, or surrender at the manor court, an abstract of the title was delivered to Mr. *Hanson*'s agent, in which the terms of the lease to *Luffkin* were correctly stated, and in a deed from Mrs. *Hotchkin* and Colonel *Buckeridge* to Mr. *Nunn*, on occasion of the said purchase, dated the 17th *March* 1802, there is a covenant against incumbrances, with an exception of quit-rents and services to the lord of the manor. "And also of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the same premises, or any of them." On the 19th *March* 1802, Mr. *Hanson* served a written notice upon Mr. *Nunn*, that he, as lord of *Great Bromley* manor, would not grant licence or consent that Mr. *Nunn*, or any other copyholder of that manor, should demise copyholds therein for any term of years, and that he would not consent to the continuance of any under-tenancy longer than at will or from year to year. On the same day, Mr. *Nunn* signed a written notice to the Plaintiffs to quit *Blagg's Farm* on the 29th *September* following, which notice was served on

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each of them on or before the 23d of the same month of *March*. The quit-rent, payable for such farm, has been regularly paid by the Plaintiff's testator or themselves, and accepted by Mr. *Hanson*, to *Old Michaelmas* 1802 inclusive.

The questions for the opinion of the Judges upon the foregoing facts were,

1st. Whether any ejectment would lie for the above messuage, or tenement, and farm, before the expiration of 14 years from the commencement of the lease?

2dly. Whether, if an ejectment would lie within the time and the tenant in possession should be evicted thereby, any action could be maintained on the covenant for quiet enjoyment?

Bayley Serjt. for the Plaintiffs. I contend that no ejectment will lie before the expiration of 14 years; and that if an ejectment will lie, an action may be maintained on the covenant for quiet enjoyment. *Nunn*, being the assignee of Mrs. *Hotchkin*, must stand in the same situation as herself, and if she could not maintain an ejectment, neither can he. Now Mrs. *Hotchkin* could not, for she certainly contemplated a longer duration of the term than one year, as appears clearly by the power given to put an end to the lease on giving 12 months' notice. I do not contend that the demise amounts strictly to a lease for more than one year, except upon an event. It is a distinct lease for one year, with a covenant not to disturb the tenant for a period of 13 years more. That covenant might be implied from the *habendum* which is to hold for one year, and at the end of that year for 13 years more, in all 14 years, so as not to be a forfeiture. But though the lease does not convey a strict legal right for more than a year (for if it did it would create a forfeiture), yet the effect of the covenant is that neither Mrs. *Hotchkin*, nor those claiming under her will eject the lessee for 13 years more, is to make Mrs *Hotchkin* trustee for the lessee during that period. The principle

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principle, therefore, that a trustee shall not maintain an ejectment against his *cestui que trust* applies to this case. An ejectment is an equitable action, and if the effect of the deed, on the part of the lessor, amounts to a stipulation that he shall not bring an ejectment until the expiration of 14 years, the Court may give effect to that intention upon the same grounds that a trustee is prevented from maintaining an ejectment against his *cestui que trust*, notwithstanding he may have the legal estate.

Shepherd Serjt. *contrà* was stopped by the Court.

Sir JAMES MANSFIELD Ch. J. The cases in which Judges have interposed to prevent a trustee from maintaining an ejectment have been confined to express trusts created in favour of the person sought to be turned out of possession, but the trust in this case is created by artificial reasoning, and indeed it is not clear in equity whether a trust is to be inferred, for if it had been, the case would probably not have been sent here. We are to consider, who has the legal estate, and what are the legal rights; and unless it can be made out that the term mentioned in the covenant means an absolute term for 14 years, and not the term conditional mentioned in the demise, I think the Plaintiffs must fail. If the Plaintiff's argument were to prevail, this deed would in effect operate as a lease for 14 years without licence, and yet not create a forfeiture, which is contrary to decided cases; if the effect of the deed were to enable the lessee to hold, and to preclude the lessor from maintaining an ejectment, it would be as much a lease without licence as if the lessee had held under a regular *habendum* and *tenendum*.

The following certificate was afterwards sent to the Court of Chancery.

Having heard counsel upon this case, we are of opinion,

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First, That an ejectment will lie for the above-mentioned messuage or tenement, and farm, before the expiration of 14 years from the commencement of the lease.

Secondly. That if the tenant in possession should be evicted by such ejectment, no action can be maintained on the covenant for quiet enjoyment.

J. MANSFIELD,
J. HEATH,
G. ROOKE,
A. CHAMBRE.

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Declaration stated that Plaintiff, at the request of *E. B.* and *M. B.*, sold and delivered to them goods of a certain value, and that, in consideration thereof, and also in consideration that the Plaintiff, at the request of the Defendant, would forbear and give day of payment of the said sum of money, Defendant, by a certain note or memorandum in writing, signed by him, undertook to pay him the money and then alleged, that Plaintiff, relying on the promise of Defendant, did forbear and give day of payment of the said sum, &c. After verdict for Plaintiff the Court refused to arrest the judgment, on the ground of the declaration not stating to whom the forbearance was given.

THE first count of the declaration in this case stated, that whereas the Plaintiff heretofore, to wit, on, &c., at, &c., at the special instance and request of one *E. B.* and one *M. B.*, sold and delivered to the said *E. B.* and *M. B.* divers goods, wares, and merchandizes of the said Plaintiff of great value, to wit, of, &c., whereof the said Defendant then had notice, and thereupon afterwards, to wit, on, &c., at, &c., in consideration thereof, and also in consideration that the said Plaintiff, at the special instance and request of the said Defendant, would forbear and give day of payment of the said sum of money, he, the said Defendant, by a certain note or memorandum in writing, signed by him, the said Defendant, undertook and faithfully promised the said Plaintiff, amongst other things, to pay him the said sum, &c. (proceeding to state money due from *E. B.* and *M. B.* and the time and mode of payment for which the Defendant

fendant undertook). The declaration then alleged that the Plaintiff, relying on the above promise of the Defendant, "did forbear, and from thenceforth hitherto hath "forborne and given day of payment of the said sum of "140*l.* and the same, and every part thereof, still re-"mains due and unpaid to the said Plaintiff."

The Plaintiff having obtained a verdict upon this count,

Vaughan Serjt. now moved to arrest the judgment, because the declaration did not state to whom the Plaintiff forbore and gave day of payment, and in support of the objection relied upon the case of *Jones* v. *Ashburnham*, 4 *East*, *p.* 455.

But *the Court* refused a rule to shew cause, observing that by necessary intendment *E. B.* and *M. B.* must have been the persons to whom the Plaintiff forbore, and that, though not specifically alleged, yet it appeared to be so with sufficient certainty, *viz.* certainty to a common intent; they also intimated that at all events the defect in the allegation, if any, was cured by the verdict.

Vaughan took nothing by his motion.

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In debt for double the yearly value, under 4 *G.* 2. *c.* 28. the Plaintiff, after stating a demise to the Defendant's wife, and her subsequent intermarriage with the Defendant, alleged in the first count a notice to quit and demand of possession delivered to the Defendant and his wife, and in the second count alleged a notice to quit and demand of possession delivered to the wife previous to her intermarriage with the Defendant. Held that to support the second count the husband need not be joined for conformity, and that to sustain the action it was not necessary to have given notice to the husband subsequent to the intermarriage.

DEBT for rent. The first count of the declaration stated, "that heretofore and before the intermarriage hereinafter next mentioned, and before and at the time of the giving of the notice to quit and making the demand of delivery of possession hereinafter also next mentioned, one *Maria Smith*, the wife of the Defendant, but then *Maria Pettit*, had been tenant to the Plaintiff for a term of years (to wit), from year to year, of a certain tenement, consisting of a messuage, dwelling-house, garden, and yard, with the appurtenances, situate in the parish of *Saint George*, *Southwark*, in the county of *Surry*, of the said Plaintiff, theretofore demised by the said Plaintiff to the said *Maria*, determinable at the will of the said Plaintiff, or the said *Maria*, on the 24th day of *June* in every year, upon a due notice being given by either the said Plaintiff, or the said *Maria*, to the other, half a year previous to the said 24th day of *June* in any year, at and under a certain yearly rent, to wit, the yearly rent of twenty-two pounds of lawful money of *Great Britain*, therefore payable by the said *Maria* to the said Plaintiff, to wit, at the parish aforesaid, in the county aforesaid; and the said Plaintiff saith, that whilst the said *Maria* was such tenant to him as aforesaid, and before the giving the notice to quit and making the demand of the delivery of possession hereinafter next mentioned, to wit, on the first day of *December*, in the year one thousand eight hundred and two, at the parish aforesaid, in the county aforesaid, she, the said *Maria*, intermarried with the said Defeuddant. And that afterwards, to wit, on the second day of *December* in the year aforesaid, at the parish aforesaid, in the county aforsaid, and after the said intermarriage, and during the said tenancy, by virtue of the said demise and the

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the reversion aforesaid belonging to the said Plaintiff, he, the said Plaintiff, made a demand and gave notice in writing to the said Defendant, and *Maria* his wife, for delivering the possession of the said tenements, with the appurtenances, to him the said Plaintiff on the twenty-fourth day of *June* then next, which was in the year of our Lord one thousand eight hundred and three, and thereby the said demise and tenancy, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, ended and determined; yet the said Defendant, not regarding the premises, nor the statute in such case made and provided, nor fearing the penalty therein contained, after demand and notice in writing given as aforesaid for delivering up possession of the said tenements, with the appurtenances as aforesaid, to the said Plaintiff according to the said notice, did not deliver up the possession of the said tenements, with the appurtenances, or any part thereof, to the said Plaintiff according to the said demand and notice in writing, but altogether neglected and refused so to do, and wilfully held over the said tenements, with the appurtenances, for a long space of time, after the said twenty-fourth day of *June* in the said year one thousand eight hundred and three, to wit, for the space of five months then next following, and did thereby, during all that time, keep the said Plaintiff, so being entitled to the said tenements, with the appurtenances as aforesaid, out of the possession thereof, and the said Plaintiff doth aver, that the said demised tenements, with the appurtenances, so held over and from the possession whereof the said Plaintiff was so kept out as aforesaid, at and during the time of the holding over of the same, were of great yearly value, to wit, of the yearly value of twenty-two pounds, to wit, in the parish aforesaid, in the county aforesaid, by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said Plaintiff to demand and have of and from the said Defendant

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dant the sum of eighteen pounds six shillings and eight pence of lawful money of *Great Britain*, parcel of the sum of one hundred and twenty-four pounds thirteen shillings and four pence above demanded, that is to say, at the rate of double the yearly value of the said demised tenements, with the appurtenances, during the time the same were so held over as aforesaid." The second count, after stating the tenancy of *Maria Smith* as before, proceeded thus, " And the said Plaintiff in fact says, that during the said tenancy last aforesaid, and before the intermarriage hereinafter next mentioned, to wit, on the second day of *December* in the year of our Lord one thousand eight hundred and two, at the parish aforesaid, in the county aforesaid, the said Plaintiff made a demand and gave notice in writing to the said *Maria* for delivering the possession of the said tenements, with the appurtenances last aforesaid, to him, the said Plaintiff, on the said twenty-fourth day of *June* then next, which was in the year of our Lord one thousand eight hundred and three, and thereby the said last-mentioned demise and tenancy, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, ended and determined. And the said Plaintiff in fact says, that after the giving the notice and making the demand as last aforesaid, to wit, on the twentieth day of *June* in the said year one thousand eight hundred and three, in the parish aforesaid, in the county aforesaid, she, the said *Maria*, intermarried with the said Defendant; yet the Plaintiff, not regarding," *&c.* as before. There was a third count for use and occupation; and a fourth upon a *quantum meruit*.

The Defendant demurred to the two first counts, and assigned for causes " that it is not stated or alleged in, nor does it appear by or from the said first and second counts, or either of them, that any demand or demands for delivery of the possession of the said premises, or either of them, or any part thereof, was or were made by the

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the said Plaintiff, or his agent or agents thereunto lawfully authorized, at or after the expiration of the said tenancies, or either of them, in the said first and second counts mentioned; nor does it appear in, by, or from the said first and second counts, that any demand of the possession of the said premises, or any part thereof, was ever made of or upon him the said Defendant. And also for that, on the contrary thereof, it appears in, by, and from the said first and second counts, that the said Plaintiff demanded the possession of the said premises before the said Defendant was interested therein; and also before the said Plaintiff was entitled to such possession; and also for that the said first and second counts are in other respects informal, uncertain, and insufficient."

To the third and fourth counts the Defendant pleaded *nil debet*.

The Plaintiff joined in the demurrer and the issue.

Best Serjt. in support of the demurrer. The Plaintiff in this case has joined two counts which ought not to have been joined. The first is founded upon a notice to quit, given after the intermarriage between the Defendant and his wife to them; and the second, upon a notice given to the Defendant's wife before the marriage. In the latter case, therefore, the Defendant's wife ought to have been joined for conformity.

But *the Court* said, that the offence was not complete until the day for delivering possession had arrived, the offence itself consisting in not complying with the demand to deliver possession at the time when it ought to be complied with. And that as the estate was in the husband's possession, at the time when the possession was to be delivered, the offence was committed by him.

Best Serjt. then insisted that if the husband was liable to be sued alone, a demand ought to be made upon him; and

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whom a penal action is to be brought. This is not an action for double rent, but for double the yearly value. There is a distinction between the 4 *G.* 2. and the 11 *G.* 2. The 4 *G.* 2. relates to notice given by the landlord, where it may be presumed that the premises are of greater yearly value than the rent paid. The 11 *G.* 2. relates to notice given by the tenant, and that statute gives a remedy by distress which might affect the property of other persons. This circumstance operates strongly on my mind. For the two statutes being *in pari materiâ*, may be considered as throwing light on each other. (*a*) It seems to me, therefore, that a demand ought to have been made upon the husband.

HEATH J. I cannot see any reason for two demands. The act speaks of one only, and that may be made before the expiration of the term, and that has been made. The estate of the husband is a continuation of the wife's estate. The double value has been called a penalty, and it is so in some degree, but the law is also a remedial law.

ROOKE J. If the case of *Wilkinson* v. *Colley* be law, I think that it decides the present case. That case has determined that nothing more is required than that a notice to quit should be given to the tenant; and if he do not quit, he is liable to pay double the yearly value; and the statute was there considered as a remedial rather than a penal law. The act indeed does give a penalty, but it is to the party grieved; and this is a distinction which has often been taken between remedial and penal laws. Here the tenant receives a notice to quit, and then marries.

(*a*) See the case of *Timmins* v. *Rowlison*, 3 *Burr.* 603. where the two acts of 4 *G.* 2. and 11 *G.* 2. were much considered and commented upon by the Court, and were held not to be so far acts in *pari materiâ* as to make a notice *in writing* necessary under the latter act because required by the first.

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How is the landlord to know whether his tenant be married or not, and if the demand be not made before the expiration of the term, the penalty is not saved. The husband, when he marries, takes his wife with all her debts; he is quite as likely to know this obligation to deliver possession, as the bond and simple contract debts of his wife, and yet it is not necessary to make a demand upon him before an action is commenced for such debts. For these reasons, I think that judgment should be given for the Plaintiff.

Judgment for the Plaintiff.

SCOTT and Another *v.* THOMPSON.

Feb. 8th.

Policy on goods on board a particular ship from *A.* to *B.* "against sea-risk and fire only;" in the course of the voyage from *A.* to *B.* the ship was carried out of the course of the voyage by a king's ship, but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured sustained sea-damage: held that the underwriters were liable for this loss.

THIS was an action on a policy of insurance, dated 16th *September* 1801, at and from *Liverpool* to *Amsterdam, against sea-risk and fire only*, upon goods on board the ship or vessel, called the *Sophia Frederica*, at three guineas and an half *per cent*. The Defendant underwrote for 200*l.*, and the interest was averred to be in the Plaintiffs. The action was brought to recover an average loss sustained by sea-damage. The cause came on to be tried the 21st day of *December* 1804, before *Chambre* J. and a special jury, when a verdict was found for the Plaintiffs, by consent, for 200*l.*, to be reduced by a reference in respect to the amount, in case the Court should be of opinion that the Plaintiff was entitled to recover upon the following case. The Defendant underwrote the policy in question for 200*l.*, and received the premium; the ship was a neutral vessel belonging to *Dantzic*; 154 cases of *Havannah* sugar, of the value of 1469*l.* 1*s.* 11*d.*, the property of the Plaintiffs, were shipped at *Liverpool* for *Amsterdam* previous to the voyage, which were loaded under his majesty's licence for the voyage, and were the subject

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of the insurance. On the 22d *September* 1801, the said vessel and cargo sailed from *Liverpool* upon the said voyage, staunch, strong, in good order and condition, and well and sufficiently provided in all respects. About 10 A. M. on the 1st *October*, in the course of the said voyage, the said vessel was boarded by his majesty's brig *Raven*, commanded by Captain *James Saunders*, who took possession of the *Sophia Frederica*, and carried her, against the will of the captain and crew, out of the course of her voyage to *Amsterdam*, into *Falmouth*, where she arrived about 12 at night, the same day, in possession of and under the direction of the officers of his majesty's said ship the *Raven*, who moored and detained her there until the 12th *November* 1801. On the 12th *November*, she was released and immediately proceeded from *Falmouth* for *Amsterdam*. On the 20th *November*, being off the coast of *Holland*, she was there detained by tempestuous weather until the 24th, during which time she sprung a leak, and on the 24th *November* she arrived at *Amsterdam*, and unloaded her cargo, which was found to have sustained sea-damage; but it was admitted on the part of the Plaintiff, that no part of such sea-damage happened before her detention by the brig *Raven*. When the said vessel sailed from *Liverpool*, she was furnished with all the proper documents for the said voyage, which were on board her at the time of the said detention. On the part of the Defendant, it was contended that the said ship, being so taken out of the course of her voyage to *Amsterdam* into *Falmouth*, was a deviation and put an end to the insurance. The question for the opinion of the Court was, Whether, under the circumstances of this case, the Plaintiffs were entitled to recover? If the Court should be of opinion that the said goods were covered by the insurance, after the ship was so taken out of the course of her voyage, a verdict was to be entered for the Plaintiffs for such damages as the arbitrator should find due. If the Court

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Court should be of opinion that the insurance was determined by the above circumstance, then the verdict to be entered for defendant.

It was agreed at the trial, that at the desire of either party this case might be turned into a special verdict.

Bayley Serjt. for the Plaintiffs. The only question arising upon this case is, Whether the underwriters are discharged on the ground of the injury having happened to the cargo out of the direct course of the voyage, and in a place to which the ship would not have gone but for the forcible interference of the cruizer by which she was detained? Deviation may be excused by the circumstances which caused it, as if it be to seek convoy or to avoid a storm. In *Elton* v. *Brogden*, 2 *Str.* 1264., where a policy was effected on a ship, carrying letters of marque, from *Bristol* to *Newfoundland*, and the orders of the owners were to put a few hands on board any prize that might be taken, and send her to *Bristol*, but that the ship should proceed to *Newfoundland*; notwithstanding which the crew obliged the captain to go back to *Bristol* with a prize taken in the voyage, and in so doing the ship insured was captured; it was held that this deviation was excused on account of the force exercised on the captain. In this case the deviation is excused because it was unavoidable; and if so, the voyage was not thereby put an end to. Notwithstanding this policy is confined to sea-risk and fire, the underwriters take upon themselves any loss arising from either of these causes, though occasioned by a delay and protraction of the voyage, which may be ascribed to some other cause. Suppose the insurance to have been against fire only, and that, on the eve of the ship sailing, she had met with an accident which had delayed her voyage, and then she had proceeded and been destroyed by fire, can it be doubted that the underwriters would have been liable? The cases of *Driscol* v. *Passmore*, 1 *Bos.*

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& *Pull.* 200, and *Driscol* v. *Bovil*, 1 *Bos.* & *Pull.* 313. proceeded upon principles similar to those which governed the case of *Elton* v. *Brogden*. In those cases the question turned principally upon the return of the ship to *Lisbon* (the voyage being from *Lisbon* to *Madeira*, from *Madeira* to *Saffi*, and from thence back to *Lisbon*), because at *Madeira* the crew, being alarmed by reports of cruizers off *Saffi*, quitted the ship and refused to return, unless the captain would promise to sail immediately for *Lisbon*; and in the latter case Mr. Justice *Buller* said, "Whether the deviation were justified by necessity or not rests upon one plain fact, *viz.* that, on receipt of the intelligence of some *Moorish* cruizers being off *Saffi*, the crew refused to proceed. What then could the captain do but return?" Now in those cases the underwriters incurred greater risk in consequence of the return of the ship, and yet they were held liable. Suppose a ship insured from all perils, except fire, and that, when she is about to sail, a fire should happen, and the ship be prevented from sailing so soon as she would otherwise have done, and that, after being repaired, she should sail and be lost; in such case, the underwriters would be liable, and yet their situation would be different from what it would have been if no fire had happened, and the ship had sailed at the period she first intended.

Best Serjt. for the Defendant. No case has been cited in which underwriters have been called upon to pay under circumstances similar to those which have happened in this case, and it is clear that the underwriters on this policy did not contemplate the loss which has happened. Had not the ship been interrupted in her voyage and detained, she would have reached the end of her voyage before the time at which the loss happened. On what principle of justice then are the underwriters called on to pay in consequence of this accident? Are they to be held liable

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liable for all risks arising from detention, though the policy is confined to sea-risk only? If the argument of the Plaintiffs prevail, there will be no neccssity hereafter to introduce the words "detention of princes" into a policy, for without these words the assured will be protected from that peril. The principle upon which underwriters are discharged by a deviation is, that another voyage is substituted. Now suppose the ship in this case to be detained five years, and then to proceed to her original destination, would the voyage still be the same? That deviation is justisfied where it arises from necessity cannot be doubted; but then the deviation must be for the benefit of all the parties to the contract. Deviation to avoid capture or a storm proceeds upon that principle; but no case can be cited to shew that a deviation is excused which is to avoid a peril to which the underwriter will not be liable if it happen. That circumstance distinguishes this case from *Elton* v. *Brogden*, *Driscol* v. *Passmore*, and *Driscol* v. *Bovil*.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. who, after stating the case, proceeded thus. For a short time I entertained a doubt whether on this limited policy the Plaintiff was entitled to recover. That doubt arose from not having sufficiently attended to the circumstances of the case; and the argument and authorities cited have satisfied me that the Plaintiff is entitled to recover. The only question is, Whether, as the ship was taken out of her course by the captain of the king's ship and detained at *Falmouth*, and the voyage was thereby made longer than it would otherwise have been, the underwriter is relieved from his obligation to indemnify the assured during the remainder of the voyage? Nothing is more clear than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who

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have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to *Falmouth* has been called) having been voluntary. The ship was carried there by force, and without any consent of those who had the management of the ship. Deviation occasioned by force, and deviation occasioned by necessity are the same; for necessity is force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable, it has no effect on the obligation of the insurer. Three or four cases have been cited. The last of them, namely, *Driscol* v. *Passmore*, proceeded upon the same principles as that of *Elton* v. *Brogden* in *Strange*, and both cases are distinguishable from this. In one of those cases there was a deviation, the ship having been carried back to *Bristol;* and in the other, the ship was forced to return by the crew. Though at first it struck me that there was something like a difference between a limited and a general policy; yet, on further consideration, I do not think that there is any difference. In the case of *Elton* v. *Brogden*, the Court do not seem to have considered the act of the crew as amounting to barratry, and indeed it would be difficult to make it appear that it was barratry. Assuming then that there was no barratry in that case, there is no ground for making a distinction between the present case and that of a general policy. Indeed if the act of the crew in *Elton* v. *Brogden* had amounted to barratry, it could have made no difference. It seemed to me at first that if a Defendant in an action on a general policy of insurance should insist upon a deviation, it might be answered that such deviation was occasioned by barratry which was another risk for which the underwriter would be liable on the policy. But that would be no answer; since it would amount to charging the underwriter under a declaration upon a sea risk, for barratry to which he could not be prepared to answer;

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answer; and he never could be liable, directly or indirectly, on a declaration which had only led him to defend himself against a sea-risk. Considering this case, therefore, and the other cases which have been decided, I do not find any thing like a real distinction between the present insurance and the ordinary insurance, including all the risks which are inserted in policies in general. We are therefore of opinion that the Plaintiff is entitled to recover.

Per Curiam, Judgment for the Plaintiff.

The Court gave leave to the Defendant to turn the case into a special verdict.

NEWTON *v.* YOUNG.

Feb. 9th.

Commissioners, under an act of parliament, directing them yearly and every year to rate, charge, tax, and assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, and added to it the arrears of the past years, and levied for the assessment so made including such arrears. Held that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad.

THIS was an action of replevin, wherein the Plaintiff declared that the Defendant, on the 8th day of *November* 1802, took the Plaintiff's cattle in a certain place called *Rodells Ground*, in the parish of *Methwold*, in the county of *Norfolk*, and unjustly detained, *&c.*

The Defendant avowed that he took the cattle, and detained the same by the authority of a certain act of parliament which was made and passed in the 35th year of the reign of his present majesty for improving the drainage of the middle and south levels, part of the great level of the fens called *Bedford Level*, and the low lands adjoining or near to the said levels, as also the lands adjoining or near to the river *Ouze*, in the county of *Norfolk*, drawing through the same to the sea by the harbour of *King's Linn*, in the said county, and for altering and improving the navigation of the said river *Ouze*, from or near a place called *Eau Brink*, in the parish of *Wiggenhall St.*

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Mary, in the said county, to the said harbour of *King's Lynn*, and for improving and preserving the navigation of the several rivers communicating with the said river *Ouze*, for and in the name of a distress, as well for a certain large sum of money (to wit) the sum of 37*l.* 12*s.* 10*d.* for so much money theretofore duly taxed, charged, and assessed under and by virtue of the said act, upon certain lands of which the said place in which, &c. from the time of the making of the said act, hitherto hath been and still is parcel, as also for a certain penalty, at the rate of 3*s.* 4*d.* for every 20*s.* of the said sum of 37*l.* 12*s.* 10*d.*, incurred and forfeited under and by virtue of the said act, by reason of the non-payment of the said sum of 37*l.* 12*s.* 10*d.* And the Defendant also made cognizance to the same effect with his avowry. The Plaintiff replied respectively, *de injuria sua propria*, and issues were thereupon joined.

The cause came on to be tried at the last assizes for the county of *Norfolk*, before Mr. Justice *Grose*, when a verdict was found for the Plaintiff, damages 1*s.*, subject to the opinion of the Court, on the following case:

The lands, in respect of which the distress was taken, are part of certain lands called *Methwold Severals*, in the parish of *Methwold*, in the county of *Norfolk*, and were, from the time of passing the said act referred to in the pleadings, to the time of taking the distress, held under a lease from the crown by *Richard Paul Jodrell* esquire, and were occupied during the whole of that period by the Plaintiff as his tenant thereof. They are within the boundary of the act, and within the jurisdiction of the commissioners of drainage mentioned therein. They are also included in what is called *Feltwell* first district, and also in what is called the second district, in the assessments hereinafter mentioned; the said commissioners having, for the purposes of convenience, divided the whole tract of land which is subject to the provisions of this act into eleven

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eleven districts. The Defendant has always been, since the passing of the act, the sole collector of taxes duly appointed for the second district aforesaid.

The 58th section of the act enacts, that the lands and grounds particularly specified and described in the beginning of that section (of which the premises in question are parcel) should yearly and every year for the space of 15 years (which has since been extended to the term of ten years by the 36 *Geo.* 3. *c.* 3. to be computed from the 24th of *June* 1795) be and the same were thereby rated, charged, taxed, and assessed; and the said commissioners for drainage were thereby required to rate, tax, charge, and assess the same during the said term with a yearly tax, not exceeding 4*d.* for and upon every acre of the said lands and grounds, as well commons as severals, which said tax so to be assessed, rated, and charged, was, in respect to any lands on demise from his majesty, to be paid by the lessees thereof, so long as they should continue lessees of the same; and on all other lands, should be paid by the respective owners or occupiers of the said lands and grounds so to be charged therewith yearly during the said term, the first payment thereof to begin and be made on the 24th of *June* 1795, and the remaining payments on the 24th day of *June* in each successive year, to such person or persons as the said commissioners for drainage from time to time should appoint to collect and receive the same, to be applied to the purposes of the act. No assessment was made by the commissioners for the years 1795, 1796, 1797, and 1798, except as hereinafter stated.

The first assessment made by the said commissioners of drainage, under the said act, bears date the 7th day of *July* 1800, and purports to be a rate of 4*d.* *per* acre *per annum* on all such fen lands and low grounds subject to inundations, lying within the boundary of the said act in the district called the second district, for one year, commencing the 24th of *June* 1798 and ending 24th *June* 1799,

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1799, with an account of the arrears then due, and charges particular sums on the persons and lands therein mentioned, and is made on *Richard Paul Jodrell* esquire.

The second assessment made by the commissioners bears date the 7th day of *August* 1801, and purports to be a rate of 4*d. per* acre *per annum*, on all such fen lands and low grounds (subject to inundations) lying within the boundary of the said act in the district called the second district, for one year, commencing the 24th *June* 1800, and ending 24th *June* 1801, with an account of the arrears then due, and this assessment is also made on *Richard Paul Jodrell* esquire.

The third assessment made by the said commissioners bears date the 26th of *August* 1802, and purports to be a rate of 4*d.* an acre *per annum*, on all such fen lands and low grounds, subject to inundations, lying within the boundary of the said act, in the district called the second district, for one year, commencing the 24th *June* 1802, with an account of arrears then due; this assessment is made on the Plaintiff by name.

These three several assesments were made at adjourned quarterly meetings, duly holden and duly adjourned, and due notice was given of the same; and also notices for the payment of the several taxes assessed in and by those three several assessments were respectively published and given, according to the directions of the act in that behalf.

On the 8th of *November* 1802, the said taxes and arrears not having been paid according to the notices, the Defendant distrained the Plaintiff's cattle, under a warrant or precept under the hands and seals of five of the said commissioners of drainage for 37*l.* 12*s.* 10*d. for eight years drainage tax*, charged upon the Plaintiff for 282*a.* 1*r.* 19*p.*; and also for 6*l.* 5*s.* 5½*d.*, being a penalty of 3*s.* 4*d.* for every 20*s.* incurred by non-payment of the said tax, and notice of the distress, together with

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an inventory of the cattle distrained, was in due manner served upon the Plaintiff.

No other sum was ever demanded of the Plaintiff than the above sums of 37*l.* 12*s.* 10*d.* and 6*l.* 5*s.* 5½*d.*

About 20,000*l.* have been raised upon the country under the tax of 4*d.* *per* acre, and about 18,000*l.* of this sum have been already expended by the commissioners, the greater part of which has been applied in discharge of the expences of obtaining the act, which was contested in three successive sessions, and the greater part of the residue in payment of the expences since incurred.

At the time of making the distress the commissioners had about 1200*l.* or 1400*l.* in the hands of their treasurer.

The question for the opinion of the Court is, Whether the Plaintiff is entitled to recover?

This case was twice argued; first in *Trinity* term last by *Sellon* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendant, and now in this term by *Best* Serjt. for the former, and *Lens* Serjt. for the latter.

Arguments for the Plaintiff. The warrant for distress, on which the Defendant relies, is bad, inasmuch as it is founded not on one, but on three distinct rates, and each of those rates comprises several years. For four years, no assessment whatever appears to have been made, and then, at the end of the fifth year, the commissioners assess for the year immediately gone by, and also include the arrears of the four years during which no assessment was made. The same observation applies to all the assessments. Now the power given to the commissioners by the act is to make a rate "yearly and every year," and not to make a rate for a period longer than a year. Indeed it appears to have been the intention of the legislature that the rate should be made from time to time at certain stated periods, and that the commissioners should be prevented from making one sweeping rate just as it should suit

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suit their convenience. If it were otherwise, the tenant might be obliged to pay a heavy charge upon the land, which he would have no means of reimbursing himself by means of deduction from his rent; for the lands upon which the charge is imposed being poor lands, a sweeping rate for several years would exceed the amount of the rent. In like manner, a remainder-man might be compelled to pay this charge, not on account of his own occupation of the land, but on account of the occupation of his predecessor the tenant for life. These circumstances demonstrate that not only the words, but the spirit of the act requires the assessment to be made annually. A retrospective poor rate is bad, and that because if permitted, it might fall heavy upon new comers in a parish, while their predecessors would altogether escape. And yet the words of the statute of *Eliz.*, under which poor rates are made, direct them to be made "weekly *or otherwise*." The same principle applies to rates made under this act. The distress therefore is altogether irregular, inasmuch as the warrant extends to the arrears of former years during which there was no assessment, and indeed, if supported in law, would be neither more nor less than a judgment for a small sum, and a writ of execution for three or four times the amount of that sum. With respect to the penalties, the warrant to levy them is also bad, if the argument as to the arrears prevails; for no man is bound to pay that to which he is not liable, and consequently cannot incur penalties by his refusal. The warrant is also objectionable on the ground that it is issued against *Newton* for arrears under an assessment made on *Jodrell*.

Arguments for the Defendant. The 75th section of the act completely answers the last objection, for it makes the person in occupation of the land liable in the first instance for the rate, though made upon the owner, and though

though the owner be ultimately liable. Indeed the rate may be made either upon the owner or occupier; and section 76 provides, that if lands be unoccupied they shall remain as a security for the rate, and any goods or chattels, which shall at any time be found upon them, shall be distrained on that account. In that case, therefore, the charge must fall upon some person not rated, for the assessment being made upon vacant lands will be levied upon the first person who becomes the occupier of those lands. The period, for which the power of imposing the rate was given by the 35 *G.* 3., was extended by an act passed in the following (*a*) year, and the preamble of that act, referring to the act of the preceding year, says, "and whereas by the said act a yearly tax of *4d. per* acre is rated, taxed, charged, and assessed upon," *&c.* and then the statute proceeds to direct that "the said tax of *4d. per* acre thereby laid and imposed" be continued for a further period. Although the words of the first act be "yearly and every year," and that perhaps may be the better way for the commissioners to adopt, still notwithstanding this direction yearly to reduce into form a certain charge already specifically imposed by the legislature, the question is, Whether that direction be so imperious that no other time for so reducing the rate into form can be substituted. It is evident that the act considers the commissioners as mere ministerial agents for putting into form that rate, the propriety and extent of which is previously decided upon. The case of *The King* v. *Tawney*, *Lord Raym.* 1011. *Salk.* 531. S. C. only decides that a retrospective poor rate must not be made *eo nomine*. Undoubtedly if a tenant for life had made default in payment of the rate, the lands would be chargeable in the hands of the remainder-man, who could only resort to the executors of the tenant for life. However that may appear to be a

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(*a*) 36 G. 3. c. 33.

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hardship, the provisions of the act will not be altered thereby; and indeed it is equally hard that the lands should be chargeable in the hands of rack rent tenants. The statute however has created that hardship. By the 43 *Eliz.* overseers are directed to be appointed in *Easter* week, or within one month of *Easter*, and yet in *The King* v. *Sparrow*, *Str.* 1123. the Court refused to quash an appointment made after that period. Indeed in *Durrant* v. *Boys*, 6 *T. R.* 580. Lord *Kenyon* expressly declared that a prospective poor rate might unquestionably be good.

Cur. adv. vult.

The opinion of the Court was now delivered by

Sir JAMES MANSFIELD Ch. J. Considering the objects for which the statute in question was passed, and which we must suppose to have been deemed very beneficial to the public by the legislature, I cannot but regret that this action has not been compromised. With a view to carry into execution the plan in which the act originated, a moderate tax has been imposed on all those lands which are to be benefited by that plan. The greater part of that tax has, we are given to understand, been already raised, but this Plaintiff (or those by whom he is put forward) wishes to have the opinion of the Court, whether he is bound to pay. With respect to the general question arising upon the words of the act, and the power of the commissioners to make the rate in the way the rates in question have been made, we think it better not to give any opinion, because there is a clear ground arising on the warrant which enables us, though with great reluctance, to give judgment in favour of the Plaintiff. Unfortunately we are compelled to gratify the wishes of an individual at the expence of the public, in a case in which it has never been intimated that the rates now in dispute were improperly assessed by the commissioners. The Defendant has avowed generally under the act of parliament;

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parliament, whereas the sum for which the warrant was granted, and the distress levied, is a sum calculated upon three several rates made in the years 1800, 1801, and 1802, and each of which rates includes the arrears of those years during which no assessment whatever was made. Indeed it is evident, from the language of the commissioners and their proceedings, that they intended to charge persons not only with the sums rated and assessed upon them, but with what they improperly call arrears of those rates which never were made. How then is it possible to support this distress, founded on a warrant to levy the arrears of a tax which the case itself states never was in fact imposed upon the Plaintiff and those other persons chargeable under the act? We do not decide whether the rate may or may not now be made for each year that has elapsed, and for which no rate has actually been made, but we think the tax for each year must be imposed by the commissioners before any arrears for those years can be levied by distress. The consequence of this opinion will be, either that the commissioners must make new rates for the several years during which they have omitted to make any rate, or if that should be deemed impossible, they must apply to the legislature for a new act of parliament.

Per Curiam, Judgment for the Plaintiff.

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Action for these words spoken by Defendant of the Plaintiff in his profession of a physician, "Dr. S. has upset all we have done, and die he (the patient) must." It was proved that the Plaintiff had practised several years as a physician, and having been called in during the absence of a physician, who, with the Defendant, attended the patient; the Defendant as apothecary made up the medicines prescribed by the Plaintiff for the patient in question. Quære, Whether on this declaration it was necessary for the Plaintiff to produce a diploma or other direct evidence that he had taken a degree in physic, in order to maintain the action?

THIS was an action on the case for defamation.

The first count of the declaration stated, that the Plaintiff before and at the time of speaking the several false, scandalous, malicious, injurious, and defamatory words after mentioned, was and thence continually hitherto hath been and still is a physician, and during all that time used and exercised and yet doth use and exercise the profession of a physician, and hath always hitherto behaved and conducted himself in his said profession with great skill, care, judgment, and integrity, and before and until the speaking of the several false, scandalous, malicious, injurious, and defamatory words after mentioned, had acquired great riches in his profession, and had deservedly gotten and obtained the good will, confidence, and esteem of many good and worthy subjects of our lord the king, who before and at the time of the speaking the said several false, scandalous, malicious, injurious, and defamatory word after mentioned, had employed the Plaintiff as a physician in the way of his aforesaid profession, to wit, at, &c. That the Defendant before and at the time of speaking and publishing of the several false, scandalous, malicious, injurious, and defamatory words after mentioned, used, exercised, and carried on the business and profession of an apothecary, and had been and was retained and employed in his business and profession of an apothecary to attend, and had attended, and did attend one *Richard Helsden*, who had laboured and was then labouring under a certain dangerous and violent disorder, at, &c. That a little before and at the time of speaking of the several false, scandalous, malicious, injurious, and defamatory words after mentioned, the Plaintiff had been retained and employed in his said profession

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fession of a physician to attend, and as such physician had attended the said *Richard Helsden*, so then labouring under the said disorder, and had, in the way of his aforesaid profession, and to the best of his skill and judgment therein, prescribed for the said *Richard Helsden* such medicines as to the Plaintiff seemed proper, and as were adapted to the disorder under which the said *Richard Helsden* was languishing, to wit, at, &c. Yet the Defendant, well knowing the aforesaid premises, but contriving, and wrongfully, and maliciously intending to injure the Plaintiff in his good name, fame, credit, and reputation aforesaid, and also in his said profession of a physician, and to bring him, the said Plaintiff, into great scandal, ignominy, and mistrust among all his patients, and other subjects of our said lord the king, and to cause it to be believed that the Plaintiff was ignorant and unskilful in his aforesaid profession, and had conducted himself ignorantly and injudiciously towards and had prescribed improperly for the said *Richard Helsden* whilst he was so disordered, and was a person not fit to be retained or employed in his aforesaid profession, and wholly to ruin the Plaintiff on, &c., at, &c., in a certain discourse which Defendant then and there had with divers good and worthy subjects of our said lord the king, of and concerning the Plaintiff in his said profession of a physician, and of and concerning his conduct in his said profession towards the said *Richard Helsden*, he, the Defendant, then and there, in the presence and hearing of those subjects, falsely and maliciously said, spoke, and published these false, scandalous, malicious, injurious, and defamatory words following, of and concerning the Plaintiff in his said profession, and of and concerning his conduct in his aforesaid profession towards the said *Richard Helsden*, that is to say, "I (meaning himself the Defendant) and Dr. *Girdlestone* (meaning *Thomas Girdlestone*, of, &c. doctor of physic, who had before then as a physician attended and prescribed medi-

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cines for the said *Richard Helsden* during the time he so as aforesaid laboured under the aforesaid disorder) both thought *Helsden* (meaning the said *Richard Helsden*) was doing well (thereby meaning that the said *Richard Helsden* was in a fair way of recovery) till Mrs. *Helsden*, (meaning *Mary Helsden*, then the wife of the said *Richard Helsden*) called in Dr. *Smith* (meaning the Plaintiff), who has upset all we (meaning himself, the Defendant, and Dr. *Girdlestone*) have done, and die he (meaning the said *Richard Helsden*) must," thereby meaning and insinuating, and wishing to have it believed, that the Plaintiff had conducted himself ignorantly in the way of his aforesaid profession towards the said *Richard Helsden*, and had in the way of his aforesaid profession prescribed improperly for the said *Richard Helsden*, whilst he was so disordered, and in such a manner as would necessarily occasion his death.

There were two other counts, in which the words were laid with some variations. Plea not guilty.

At the trial of this cause before Sir *James Mansfield* Ch. J. at the last assizes for the county of *Suffolk*, it was proved that Dr. *Girdlestone*, who was a physician at *Yarmouth* of longer standing than Dr. *Smith*, had been attending one *Richard Helsden* as a patient, and that the Defendant was employed as his apothecary; that Dr. *Girdlestone* being obliged to leave *Yarmouth* for a day, the wife of *R. H.* became very anxious during his absence, and sent for the Plaintiff, who saw her husband and prescribed for him, and the Defendant as apothecary made up the prescription; that on the return of Dr. *Girdlestone* the next day, the Plaintiff begged he might be sent for, but Dr. G. refused to attend because the Plaintiff had been called in; and that shortly after this the Defendant spoke the words laid in the declaration, at the office of the Town Clerk of *Yarmouth*. On the part of the Defendant, it was objected that the Plaintiff must be nonsuited, because he had not produced any evidence of his being a regular

physician,

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physician, and in support of the objection the case of *Moises* v. *Thornton*, 8 *T. R.* 303. was cited. But his Lordship being of opinion that the case of *Moises* v. *Thornton* did not apply to the case, overruled the objection, and the Plaintiff obtained a verdict for 100*l.*

A rule having been obtained on a former day, calling on the Plaintiff to shew cause why this verdict should not be set aside and a new trial be had,

Sellon Serjt. now shewed cause. The allegations in this declaration were not such as made it necessary for the Plaintiff to prove his diploma. He merely alleged that he used and exercised the profession of a physician. Now in *Johnson*'s Dictionary a physician is said to be one who professes the art of healing, and the definition in the Encyclopedia is to the same effect. The statutes respecting physicians make a distinction between graduates, licenciates, and common physicians; the two latter descriptions of persons are not allowed to practise within 20 miles of *London*. In this case there was abundant evidence that the Plaintiff practised as a physician. Had the words spoken by the Defendant impeached the Plaintiff's title as a physician, and had the Plaintiff made those words the subject of an action, he must in such case have supported his title to the character of a physician by the best evidence by which that title could be supported. Thus, if the Defendant had called the Plaintiff a quack, or, as in *Moises* v. *Thornton*, had alleged that he was not a regular physician, the Plaintiff must have rebutted that imputation by producing his diploma. But the words here only impeach his skill in that character which they admit him to be entitled to, and which the evidence in the case still farther proves him entitled to, at least in the opinion of the Defendant, for the Defendant as apothecary made up his prescription. In *Moises* v. *Thornton* the allegation in the declaration was that the Plaintiff "had

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duly taken the degree of doctor of physic," and upon that ground the judgment of the Court proceeded, for in support of that allegation nothing but a diploma regularly proved could be received in evidence. The safe rule seems to be, that where a man's skill only is impeached, and not his title, he need not prove his title; but where his title is impeached, and the Plaintiff wishes to vindicate that title, he must produce his diploma. But at all events it was unnecessary in this case for the Plaintiff to prove his title to the character of a physician, because both the Defendant's words and conduct are good *prima facie* evidence of the Plaintiff being what he has called himself in the declaration; inasmuch as the Defendant spoke of him as a physician, and treated him as such by making up his prescriptions. Now upon this very principle proceeded the case of *Berryman* v. *Wise*, 4 *T. R.* 366., where, in an action of slander by an attorney, for words spoken of him as such, charging him with swindling and threatening to have him struck off the roll of attornies, it was holden unnecessary for the Plaintiff to prove his admission as an attorney. So also in *Radford q. t.* v. *M'Intosh*, 3 *T. R.* 632., which was an action for penalties on the post-horse acts by the farmer of the duties, the Court of King's Bench resolved that proof of the Defendant having accounted with the Plaintiff as farmer, relieved the latter from the necessity of proving his appointment from the lords of the treasury.

Shepherd Serjt. *contra* It is perfectly clear that no action can be maintained for the words spoken by the Defendant, except as spoken of the Plaintiff in his professional character. Indeed the Plaintiff, by his allegation, assumes that character upon the record which it was necessary for him to assume in order to support his action, *viz.* the character of a physician. Nor would it have sufficed to state that he was a doctor; for the term "doctor".

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tor" is uncertain, unless explained by alleging in what science that degree has been granted. The averment, therefore, that the Plaintiff is a physician, is either an insufficient averment, or an averment that he is a physician duly constituted. If it be the latter, then, according to *Moises* v. *Thornton*, it must be proved by his diploma. Nor does the conduct of the Defendant, in making up the Plaintiff's prescription, or in speaking of him as a physician, exempt him from the necessity of supporting by the best possible evidence that professional character which he assumes, and without which this action could not be maintained. Suppose it had been said of the Plaintiff that he was no more a physician than the horse doctor in the town, must he not in such case have supported his action by proof of his being a doctor of physic? Had the words spoken admitted the Plaintiff to be a physician duly constituted, *viz.* one having a regular diploma, proof of that fact might possibly be thereby dispensed with. But such is certainly not the import of the words in this case; and with respect to the Defendant having made up the medicine according to the Plaintiff's prescription, it is no more than he would have done for any skilful person by whom he had been directed, whether a physician or not. The case of *Pickford* v. *Gutch* cited in *Moises* v. *Thornton*, 8 *T. R.* 305, is precisely in point, for there the allegation was that the Plaintiff "had used and exercised the profession of a physician," and proof was adduced of that fact; but *Buller* J. was of opinion that his diploma must nevertheless be produced. The case of *Berryman* v. *Wise* is distinguishable from this, because the Defendant by his words admitted the Plaintiff to be on the roll of attornies, which was all that was necessary to support the action. The same answer may be given to *Radford q. t.* v. *M'Intosh*; but it may be observed that the decision in that case goes a great way.

Cur. adv. vult.

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On this day, the learned Judges, not being agreed, delivered their opinion *seriatim*.

Sir JAMES MANSFIELD Ch. J. after stating the case, proceeded thus: The foundation of this action is the injury done to the Plaintiff in his character and practice as a physician. There has been some dispute about the meaning of the word "physician." The meaning of the word I take to be this, a person who prescribes medicine for the sick. The declaration is founded on the practice of the Plaintiff. If, however, it was necessary to prove at the trial, by strict evidence of degrees, that he had lawfully practised, the objection to his recovery is well founded; for the practice being the ground of the action, no action can be maintained for lessening that which ought not to exist at all. The objection is founded upon reason and good sense: but the only question is, Whether in this particular action upon these particular words, the evidence offered was not sufficient *primâ facie* evidence that the Plaintiff had lawfully practised as a qualified authorised doctor of physic? If that evidence was not sufficient to call upon the Defendant to shew the contrary, then the Plaintiff ought to have been nonsuited. When the objection was first taken it struck me, that considering the character of the Defendant, and the situation in which he stood with respect to the Plaintiff, and the nature of the words themselves, there was sufficient *primâ facie* evidence that the Plaintiff had practised lawfully. I do not mean to say that in any case a person who practises unlawfully could maintain such an action, but that in this case there was sufficient evidence of lawful practice till the contrary was proved. I made a note of the question at the time as a matter of doubt; I have since considered it, and the opinions entertained by two of my Brothers have given me more reason to doubt of the propriety of my opinion than I at first had; but having again,

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again, and again revolved the matter in my mind, I have come back to the opinion which I first held at the trial. The Plaintiff had practised physic for many years without having had his right to practise impeached or doubted by any one. Though there might be some difficulty in instituting a prosecution against a person for practising physic unlawfully, it is by no means impossible; the stat. of *Hen.* 8. having confirmed the charter relating to the practice of physicians, which provides that no one shall practise physic without having been examined by the college of physicians and obtained letters testimonial, with an exception of persons who have taken degrees in *Oxford* or *Cambridge*. Since the union with *Scotland* it has been considered, though I do not exactly know upon what ground, that a degree conferred by a *Scotch* university is of the same effect as a degree conferred by the universities of *Oxford* or *Cambridge*, though in looking through the articles of union I find nothing upon the subject, except that the four *Scotch* universities shall subsist as before with the same rights. Had the matter been attended to at the union, some express provision would probably have been made; but although no such provision was made, it has been generally understood that in consequence of the clause alluded to, a diploma granted by one of the *Scotch* universities gives the same right to practise physic as a degree at one of the *English* universities, and dispenses with the necessity of being examined by the college of physicians, and obtaining letters testimonial from thence. This right of examination is not very likely to be exercised upon persons practising physic, when it is in their power for about 14*l.* to obtain a diploma from a *Scotch* university. But a person, practising physic without any authority, is liable to a prosecution at the suit of any person; for as the prohibition is general, and no particular mode of punishment is pointed out, it follows that he who offends against the provision is liable to an indictment.

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There is indeed a good reason why such prosecutions are not instituted, arising from the difficulty of ascertaining whether a degree of diploma has been obtained or not But the proof, though difficult, is not impossible. This being the law upon the subject, and Dr. *Smith* having practised physic four or five years, he is called upon to attend a sick person for whom he prescribes; and the Defendant is the apothecary employed who makes up the prescription. In this situation of things the Defendant utters the words charged in the declaration, and without imputing to the Plaintiff any want of qualification by degree, treats the Defendant as a physician, calls him doctor, and ascribes to him mal-practice in his profession by imputing the death of Mr. *Helsden* to the medicines prescribed by him. Considering therefore the nature of the words, and the situation of the Defendant, that the charge had no relation to the want of qualification, but merely to the practice, and that it was accompanied by the expression "Dr. *Smith*," I think that these circumstances afforded sufficient *prima facie* evidence that the Plaintiff was a doctor. And though it is true that in the country the word "Doctor" means little, yet when the Defendant, who made up the prescription, called the Plaintiff by that name, I thought and I still think that it afforded evidence that he was an authorised physician. At the trial I was not aware of the cases. But I find that the Courts have holden evidence that a man has acted in a particular character to amount to proof that he was entitled to that character. The case of *Moises* v. *Thornton* was cited; but it does not appear to me to apply. In that case the defamatory words related to the want of a diploma; the declaration contained an averment that the Plaintiff had a diploma, and it was therefore necessary to prove it. The case of *Pickford* v. *Gutch* is certainly stronger. There the defamation consisted in calling the Plaintiff a quack; and one meaning of the word quack is a person who

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who sells nostrums of which the component parts are not known; but the word is more commonly used in opposition to a physician regularly qualified; and in this sense, proof of the diploma would be as necessary as in *Moises* v. *Thornton*. These are the only authorities which apply to the case of a physician. But the case of *Berryman* v. *Wise* bears a considerable analogy to the present, and there are others also which in some degree apply. In *Berryman* v. *Wise*, the Court thought that the Defendant's threat of getting the Plaintiff struck off the roll of attornies amounted to proof of the allegation in the declaration that the Plaintiff was an attorney. Yet this was but a slight ground; for the Defendant could have no certain knowledge that the Plaintiff was an attorney; he could only know that he had practised as an attorney; and supposing him to be duly authorised, he threatens to get him struck off the roll. Here the Defendant calls the Plaintiff "Doctor," with reference to his practice, having made up the medicines prescribed. This indeed does not prove that the Defendant knew him to be qualified. But the case stands on the same footing as *Berryman* v. *Wise*: and it might well be considered as a surprise upon the Plaintiff that he should be called upon to prove himself a doctor after the Defendant had called him so in this very transaction. Mr. Justice *Buller*, in the case of *Berryman* v. *Wise*, says, that in the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters without producing their appointment, and that even in the case of murder. So in actions to recover double the value of tithes withdrawn, Lord *Kenyon* seems to have thought (*a*) that it would be sufficient to prove that the Plaintiff is in the act of receiving the tithes. In that case indeed I should have doubted whether further proof would not have been necessary. But it is no very violent presumption that a man is acting

(*a*) See *Radford* v. *M'Intosh*, 3 T. R. 634.

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ing lawfully until the contrary is shewn. If a butcher or baker be abused for unskilfulness, or misconduct in his trade, it will be presumed that he was lawfully carrying on his trade, though he be not entitled so to do without having served an apprenticeship. I do not indeed say that these cases are precisely similar to the present, where the fact of a degree having been obtained may be ascertained by a reference to the books of the universities, but the reason and sense of the thing are the same. In one case a degree is to be proved, and in the other a seven years' apprenticeship. In the case of *Radford* v. *M'Intosh*, the Court relied upon the circumstance of the Defendant having accounted with the Plaintiff in the character of farmer general, as proving that the Plaintiff was lawfully entitled to that character. In the case of *Bevan* v. *Williams* (a), Lord *Mansfield* observes, that all evidence is according to the matter to which it is applied, and the person against whom it is used: and the action there being for non-residence, it was holden that acts done by the Defendant, as parson of the parish, were evidence that he was parson. The proof of qualification may vary according to the subject as well as the person. If the scandal had related to the Plaintiff's qualification, as in *Moises* v. *Thornton*, and *Pickford* v. *Gutch*, the evidence here produced would not have been sufficient, but the qualification must have been strictly proved. But here, according to the subject matter of the case, I think that the evidence was sufficient. There is one more case upon the subject, and that is *Cross* v. *Kaye*, 6 *T. R.* 663., which was an action to recover a penalty against an attorney for prosecuting actions without a certificate; and the declaration having only stated that the Defendant had done the several acts as an attorney, without averring that he was admitted, enrolled, or registered, and an objection being taken in arrest of judgment on this ground, Lord

(a) 3 *T. R.* 635. n. *a*.

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Kenyon held that there was no foundation for the objection, saying it is sufficient for this purpose that the Defendant acted as an attorney. This indeed was carrying the matter much beyond the former cases, for it hardly seemed to follow that a person not enrolled as an attorney was to be liable to penalties which applied only to attornies enrolled in some court. But in the present case, if it were necessary to prove a diploma the consequence would be that a physician, who having been educated in *Scotland* and obtained a diploma there, and afterwards practised for 30 years at *York* or in *London* (and the longer he had practised the greater would be the danger), would be obliged to run the hazard of his diploma being lost, and must depend on the accuracy of the books of the university whenever he might be abused for mal-practice in his profession. Where indeed the abuse relates to the want of qualification, the Plaintiff must prove it; but it would be a great hardship that he should be obliged to do so where the scandal is confined to mere misconduct. On the whole, therefore, I am of opinion that sufficient *prima facie* evidence was offered to enable the Plaintiff to maintain this action, the Defendant not having adduced any thing by way of answer.

HEATH J. I am of the same opinion. I have no doubt that if this case had been tried fifty years ago, it would have been thought necessary for the Plaintiff to prove, by regular evidence, that he was a physician. I remember an action against a clergyman in which, after proving institution, the question was, whether it were necessary to prove induction also? and it was held that after long possession induction might be presumed; and certainly of late years the Courts have been inclined to relax the strictness of the old rules respecting proof which were thought to be attended with great expence and difficulty. As my Lord has gone through the cases, I shall not pursue them.

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them. None of them are directly in point. But the question is, whether such a clear rule may not be extracted from them as may enable counsel to advise their clients, without resorting to subtle distinctions, what proof is necessary to be given? It seems to me that where a Defendant, in the course of the transaction on which the action is founded, has admitted the title by virtue of which the Plaintiff sues, it amounts to *primâ facie* evidence that the Plaintiff is entitled to sue. This rule is subject to little difficulty. Some of the cases, though not in point, certainly bear strongly upon this subject. In the case where the Defendant had accounted with the farmer of the post-horse duty, the Court thought that his conduct afforded a sufficient presumption that the Plaintiff was entitled to the character of farmer of those duties.

ROOKE J. I cannot but entertain great doubts of my own opinion, when I find that it differs from that of my Lord and my Brother *Heath*. The declaration in this case is for words, and it ayers that the Plaintiff was and still is a physician, and hath used and exercised the practice of a physician. The rule of law has always been very strictly observed respecting the proof of words themselves, on this ground, that men often speak words unadvisedly. If, however, scandalous words be spoken, and those words proved, the party is liable to an action. It has been considered that words often proceed from heat, and are spoken in haste, and that it is therefore necessary to prove precisely what the party said. If that be so, it appears to me that it would be laying down a very refined rule, to hold that if the words spoken import an admission of the Plaintiff's title, the title need not be proved, but that if they do not import such an admission, it must be proved. Thus if the words had been "till Mrs. *H.* called in Dr. *Smith*, who I believe has no diploma, *&c.*"

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the Plaintiff must prove his title, but if the latter words were omitted, then he need not. This distinction seems to me to be more subtle than would be allowed in old times when the Courts were more strict than they are now. With respect to the case of the attorney, whatever doubts I may entertain, I shall only say at present that I think it was a strong case; there the words directly alluded to the Plaintiff's enrolment, since they contained a threat that the Defendant would have him struck off the roll; but in the present case, the admission is founded on nothing more than this, that the Plaintiff, being notoriously practising as a physician, and the Defendant employed as the apothecary to make up the medicines, the latter called the former "Doctor *Smith*;" this does not appear to me sufficient to excuse the Plaintiff from proving himself to be a physician. The complaint is this, "I am a physician, and the Defendant has slandered me in my profession." The word "Doctor" is very vague; it must therefore be coupled with the other expressions, and with the circumstance of the Defendant having made up the medicines. I do not think that a counsel would be under any great difficulty in advising his client upon the necessary proof in such a case as this. He would say, the Plaintiff in the declaration states himself to be a physician: there is indeed a case which says, that if the words have admitted the Plaintiff's title, it need not be proved; but these words do not admit the qualification, and therefore I think the diploma must be produced. As to the difficulty of producing the proof, if a man has taken a degree in an *English* university, he can scarcely be under any difficulty at all; if the instrument under which he claims has been lost, he may give parol evidence of its former existence; and if he has practised under a diploma from a *Scotch* university, he must submit to the inconvenience to which the irregularities of those universities may subject him. I feel my

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opinion in some degree fortified by the case of *Pickford* v. *Gutch*; no one there doubted of the propriety of calling for the diploma; the distinction whether the title were admitted by the words or not did not then occur to any one, nor can I now bring my mind to assent to the propriety of that distinction.

CHAMBRE J. I am of the same opinion. I do not think that any evidence has been given of the Plaintiff being a physician lawfully authorised to practise. All the material facts in the declaration are put in issue, consequently they must all be proved by legal evidence. In general the strictest proof is required. Several cases indeed have occurred introducing exceptions, but I do not think that this is one. The fact of the Plaintiff being a physician is the very gist of the action. I will first take notice of the cases; observing, however, that I had rather rely upon the general principles of evidence than on the few cases which may appear analogous to this. Those cases indeed do not seem to me conclusive of the question, and some of them I consider as having proceeded rather too far. The rule of evidence, as applicable to the allegations in a declaration, depend upon the way in which the facts alleged are introduced; if they be mere matters of inducement, they do not require such strict proof as those allegations which are precisely put in issue between the parties. So there are some instances in which strict proof is made unnecessary, because the party against whom it would otherwise be requisite to produce proof of some particular fact has precluded himself, in the way of estoppel, by his conduct, from disputing the fact. There are few cases indeed, in which a man's own acts operate against him in the way of estoppel, though they may often be used as good *primâ facie* evidence against him. Such is the rule in actions against clergymen for non-residence, in which it is reasonable that the acts of the Defendant

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Defendant as parson, and his receipt of the emoluments of the church, should be evidence against him that he is parson, without calling upon the Plaintiff to prove the Defendant's title formally. So in actions for subtraction of tithes, proof of the Defendant's former acknowledgments of the Plaintiff's title to the tithe as against the Defendant who is a wrong-doer is deemed sufficient. And indeed it often happens that a Plaintiff is called upon to produce slighter evidence of title against a Defendant who is a wrong-doer than he would against any other person. Upon this principle proceeded the case of *Radford q. t.* v. *M'Intosh*, though I think the principle was pushed too far in that decision. There the action being for penalties under the post-horse act by the Plaintiff as farmer general, proof of his appointment as such was dispensed with as against the Defendant, because he had previously accounted with him as such. Perhaps it was just in that case to put the Defendant to negative the Plaintiff's title to sue, by shewing that he was not farmer general, and to hold the Defendant estopped from saying that he was not so without proof of the negative. The case of *Berryman* v. *Wise* was a relaxation of the rules of evidence, though perhaps under the special circumstances well warranted. There, the words spoken, were spoken of the Plaintiff as attorney in a particular cause, and being a threat to have him struck off the roll, amounted to a distinct acknowledgment of his professional character as an attorney. Indeed the Court proceeded entirely upon that ground. The next case in point is that of *Cross* v. *Kaye*, 6 *T. R.* 663., and it appears to me that one of the principles laid down in that case would, if recognised and sanctioned, destroy all rules of evidence whatsoever. There the action was for penalties under the 25 *G.* 3. *c.* 80. which enacts that every attorney admitted, enrolled, or registered in any of the superior courts, shall annually take out a certificate; and the declaration only alleged that the Defendant

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Defendant acted as an attorney, without alleging that he was admitted, enrolled, or registered. Lord *Kenyon* appears to have holden rather hastily, on a motion in arrest of judgment, that the declaration was good. The point indeed was not judicially decided, and surely it was impossible for the Court to supply an averment which was the very *gist* of the action, and to hold the Defendant liable to the penalties whether he was alleged to be within the provisions of the act or not. Let us, however, now consider the case before the court. The 14 & 15 of *H.* 8. *c.* 5. contains not a prohibition *sub modo* of any person not examined by the college of physicians, or a graduate of *Oxford* or *Cambridge*, practising physic throughout *England*, but an absolute, unqualified prohibition. In the course of the argument, much comment was made respecting the meaning of the word physician, and it was insisted that a man may lawfully practice physic, though he has never taken any degree, or in any way complied with the directions of the stat. of *H.* 8. By that statute all persons are prohibited, except those who have letters testimonial from the college of physicians, or are graduates of *Oxford* or *Cambridge*, having accomplished all things for their form without any grace. The Plaintiff in this case, being a person who practises physic in *England*, is within the provisions of that act. With respect to a diploma obtained without any previous exercise or study from one of the *Scotch* universities, by the mere payment of a sum of money, I do not know that such a diploma will, if strictly inquired into, authorise any person to practise physic. Those who obtain degrees at *Oxford* or *Cambridge*, are required by the stat. of *H.* 8. to have "accomplished all things for their forms without any grace," before they can practise physic. The act of union may possibly have put *Scotch* degrees on a better footing than *English* degrees. In the cases referred to by the Plaintiff's counsel, the direct acknowledgments of the several characters

characters in which the Plaintiffs sued prevailed in their favour; but in this case the only acknowledgment by the Defendant of the Plaintiff's professional character is that which arises by implication from the Defendant having called him "Doctor," and made up his prescriptions. Now we all know how flippantly the title of doctor is given to persons who have no pretension whatever to it. Indeed those to whom it is given may possibly have acquired it in some foreign university. No presumption in the Defendant's favour can arise from his four years' practice. There are indeed many cases in which length of enjoyment may found a presumption of right, but here the qualification must arise from a diploma, licence, or degree, and there is no evidence in this case which would not tend to convict the Plaintiff of practising without a qualification. The very practice relied on will prove him guilty. With respect to the supposed inconvenience in case of the diploma or other instrument being lost, it admits of an easy remedy. The Plaintiff knows where he has obtained his licence, and he may supply the defect by secondary evidence. But what does the Defendant know? He must send to the two universities in *England*, to the college of physicians, and to all the universities in *Scotland*, and I do not know whether the union with *Ireland* would not also render it necessary for him to send to the universities in that part of the united kingdom. And he must produce witnesses to prove that he has made search in all those places. In point of inconvenience, there is no comparison. There being no evidence then but what would convict the Plaintiff of wrongful practice upon an indictment, I think he can maintain no action for the loss of those fees to which he could have no lawful title. In this case, as the Court is equally divided, my opinion will have no effect, and as I dare say that this gentleman, in point of fact, is legally

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authorized to practise, I am not sorry that the verdict which he has obtained will stand.

The Court being equally divided no rule was made, and consequently the Plaintiff retained his verdict.

(IN THE HOUSE OF LORDS.)

Feb. 27th 1804.

ASKEW *v.* Sir ROBERT MACKRETH, in Error.

Certain premises were conveyed by deed to a trustee to secure an annuity, in trust, if the annuity should be in arrear 60 days, by lease, sale or mortgage to raise the arrears, and permit the person entitled to the freehold to receive the rents and profits of the residue, and he was created a trustee for the grant till default of payment. The memorial of the annuity described the trustee to be "a trustee nominated on the part of the grantee," without stating any of the trusts; held to be an insufficient description under 17 G. 3. *c.* 26. If the consideration for an annuity be paid by the clerk to the bankers of the grantee, the deed by which the annuity is granted must specify the name of such clerk, and describe him as the person by whom the consideration was actually paid.

THIS was a proceeding in replevin in the Court of King's Bench at the suit of Sir *Robert Mackreth*, against *Richard Askew*.

The Defendant made cognizance as bailiff of the Duke of *Queensberry*, and justified the taking the goods and chattels mentioned in the declaration, on the ground that the said Sir *Robert* and *John Martindale*, on the 29th of *November* 1793, by an indenture duly executed by them, conveyed unto *Thomas Coutts* and his heirs, amongst other premises, the mansion-house in which the said goods and chattels were taken, to hold the same to the said *Thomas Coutts* and his heirs, to the use, intent and purpose that the said duke should and might, from thenceforth yearly, receive and take, during the term of his natural life, an annuity of 2000*l.*, to be yearly issuing and payable out of the said mansion-house and the said other premises, and to be paid to the said duke on the 9th day of *May* and the 9th day of *November* in every year, by even and equal portions; and to and for the further use, intent, and purpose, that if any part of the said annuity should be behind or unpaid twenty-one days after

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any of the said days whereon the same ought to be paid as aforesaid, it should be lawful for the said duke, during the term of his natural life, to distrain upon the said mansion-house and other premises, in satisfaction of the arrears of the said annuity; and the said *Richard Askew*, as such bailiff, justified the taking of the said goods and chattels as a distress for the sum of 8000*l.* due for four years, of the said annual sum of 2000*l.* on the 9th day of *November* 1800.

The Plaintiff below craved *oyer* of the indenture mentioned in the said cognizance, and set it forth in his plea in bar, and the same appeared therefrom to be an indenture of five parts, made the 9th day of *November* 1793, between the said Sir *Robert* of the first part, *John Martindale* of the second part, *Henry Martindale* of the third part, the said Duke of *Queensberry* of the fourth part, and the said *Thomas Coutts* of the fifth part; and thereby, after reciting that certain premises therein mentioned had been conveyed by indentures of lease and release, bearing date the 30th and 31st days of *October* 1793, unto the said *Henry Martindale* and his heirs, to the use of the said Sir *Robert Mackreth* and his assigns for his life, remainder to the use of the said *John Martindale* in fee, and also reciting that the said *Henry Martindale* was entitled to certain other premises, therein particularly mentioned, for the residue of a term of twenty years, in trust for the said Sir *Robert Mackreth* during his life, remainder to the said *John Martindale* and his heirs, and reciting that the said duke had contracted with the said Sir *Robert Mackreth* and *John Martindale* for the purchase of an annuity of 2000*l.* for his own life for 14,000*l.*, it was witnessed that in consideration of the sum of 14,000*l.* of lawful money of *Great Britain* to the said *Robert Mackreth* and *John Martindale* in hand, well and truly paid by the said duke at or before the sealing and delivery of the said indenture, the receipt of which said sum of 14,000*l.* they

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the said Sir *Robert Mackreth* and *John Martindale* did thereby respectively acknowledge, they the said Sir *Robert Mackreth* and *John Martindale*, according to their respective estates, rights, and interests, did convey the said premises, to which the said Sir *Robert Mackreth* was entitled for life, and the said *John Martindale* was entitled in fee as aforesaid, unto the said *Thomas Coutts* and his heirs, upon the trusts, and for the ends, intents, and purposes, and subject to the provisoes and agreements thereinafter limited, declared, or expressed and contained, of and concerning the same; that is to say, that the said duke might take the said annuity out of the same premises, and might distrain for the same thereon, in case default should be made in payment of any part thereof for 21 days, and if the annuity should be in arrear 40 days, might enter on the same premises and receive the profits thereof until all arrears of the said annuity should be satisfied, and subject to the said annuity, and the said powers and remedies for the recovery thereof, to the use of the said *Thomas Coutts* for the term of ninety-nine years, to be computed from the day next before the day of the date of the said indenture, without impeachment of waste, upon and for the trusts, intents, and purposes, and subject to the proviso thereinafter declared and contained of and concerning the same term; and after the determination of the said term of ninety-nine years, and in the mean time subject thereto and to the trusts thereof, to such uses, and for such intents and purposes as the same premises, at or immediately before the execution of the said indenture, stood limited and assured in and by a certain therein recited indenture of release and assignment of the 31st day of *October* then last past; and it was by the said indenture of the 9th day of *November* 1793 agreed and declared by and between the said parties thereto, that the said manor, hereditaments, and premises were limited to the said *Thomas Coutts* for the said term of ninety-nine years,

years, upon trust, to permit and suffer the person or persons entitled to the freehold of the same premises to receive the profits of the same premises to his and their own use, until default should happen to be made in due payment of the said annuity, or some part thereof, but upon trust, that in default of the payment of the said annuity for sixty days, the said *Thomas Coutts* might, out of the profits of the same premises, or by sale, lease, or mortgage of the same premises for all or any part of the said term of ninety-nine years, raise and levy sufficient to pay the arrears, costs, and charges, and permit the person entitled to the freehold to receive and take the overplus of the rents and profits. Provided always, and it was thereby declared and agreed, by and between the said parties to the said indenture, that from and after the decease of the said duke, and payment of all arrears of the said annuity, the said term of ninety-nine years should be at an end; and by the said indenture of the 9th day of *November* 1793, the said *Henry Martindale*, at the request and by the direction of the said *John Martindale* and Sir *Robert Mackreth*, did convey his said interest in the said premises, to which the said *Henry Martindale* was so entitled for the residue of the said term of years as aforesaid, to the said *Thomas Coutts*, to have and to hold the same unto him, upon such trusts, and for such ends, intents, and purposes as were thereinbefore mentioned of and concerning the said premises comprised in the said term of ninety-nine years, or as near thereto as the respective property would admit; and the said Sir *Robert Mackreth* and *John Martindale* did by the said indenture covenant with the said *Thomas Coutts* that they would, for the better securing the payment of the said annuity, surrender into the hand of the lord of the manor of *Marydown*, in the county of *Southampton*, certain premises, in the said indenture mentioned, to the use of the said *Thomas Coutts*, his heirs and assigns, during the lives of the said Sir *Robert Mackreth*, *John Dicker*,

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and *John Windebank*, and the lives and life of the survivors and survivor of them, upon such trust, and for such ends, intents, and purposes as are herein before mentioned, expressed, and declared, of and concerning the said terms of ninety-nine years and twenty years, or as near thereto as the nature of the said copyhold would admit; and the said indenture having been so set out on *oyer* as aforesaid, the said Sir *Robert* pleaded that the said duke, within twenty days of the execution of the said indenture in the said cognizance mentioned, and in his plea in bar set forth, *viz.* on the 11th day of *November* 1793. caused a certain memorial thereof to be enrolled in the High Court of Chancery at *Westminster*, as follows; (that is to say)

A memorial to be enrolled in the High Court of Chancery, pursuant to an act of parliament passed in the 17th year of the reign of his present majesty king *George* the third, of indentures of lease and release, bearing date respectively the 8th and 9th days of *November*, in the year of our Lord one thousand seven hundred and ninety three, the lease made between *John Martindale*, of *Cookham*, in the county of *Berks*, Esquire, and *Robert Mackreth*, of *Ewhurst*, in the county of *Southampton*, Esquire, of the one part; and *Thomas Coutts*, of the *Strand*, in the county of *Middlesex*, of the other part; and the release made between the said *Robert Mackreth*, of the first part; the said *John Martindale*, of the second part; *Henry Martindale*, of *Knightsbridge*, in the said county of *Middlesex*, gentleman, a trustee for the said *John Martindale* and *Robert Mackreth*, of the third part; the most noble *William* duke of *Queensberry*, of the fourth part; and the said *Thomas Coutts*, a trustee nominated on the part of the said duke, of the fifth part; whereby the said *Robert Mackreth* and *John Martindale*, in consideration of 14,000*l.* of lawful money of *Great Britain* to them the said *Robert Mackreth* and *John Martindale* well and truly paid by the said duke, did grant unto

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unto the said duke and his assigns one annual sum or clear yearly rent charge of 2000*l.*, issuing and payable out of certain lands therein particularly described, for and during the life of him the said duke; also of a certain bond, bearing date with the abovementioned indenture of release, whereby the said *John Martindale* became bound to the said duke in the penal sum of 28,000*l.*, with a condition thereunder written, that in consideration of the sum of 14,000*l.* to the said *John Martindale*, paid by the said duke, he, the said *John Martindale*, should pay to the said duke, or his assigns, one annuity or clear yearly sum of 2000*l.* of lawful money of *Great Britain*, for and during the natural life of him the said duke; and also of a warrant of attorney, bearing date with the abovementioned indenture of release and bond, authorising the attornies, in such warrants named, to appear for the said *John Martindale* in his majesty's Court of King's Bench, as of this *Michaelmas* term, *Hilary* term next, or any other subsequent term, and receive a declaration for him in an action of debt at the suit of the said *William* Duke of *Queensberry*, and to confess a judgment for the sum of 28,000*l.*, besides costs of suit, and which said indenture of lease, as to the execution thereof by the said *Robert Mackreth* and *John Martindale*, is witnessed by *William Frogatt*, of *Castle Street*, *Leicester Square*, *London*; and the said indenture of release, as to the execution thereof by the said *Robert Mackreth*, *John Martindale* and *Henry Martindale*, is witnessed by the said *William Frogatt*, and *Edward Robson*, his clerk; and the said bond and warrant of attorney, as to the execution thereof respectively by the said *John Martindale*, are witnessed by the said *William Frogatt*; the sum of 14,000*l.* above mentioned, to be paid by the said *William* Duke of *Queensberry* to the said *Robert Mackreth* and *John Martindale*, was so paid in fourteen notes of the Bank of *England*, of 1000*l.* each, and numbered as follows (setting out the numbers).

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And the said Sir *Robert* thereupon pleaded in bar, That no other memorial of the said indenture in the said cognizance mentioned was enrolled of record in the said High Court of Chancery within twenty days of the execution of the said indenture, and that the said sum of 14,000*l.*, in the same indenture mentioned to be paid to the said Sir *Robert Mackreth* and *John Martindale* by the said duke, was not paid to them, or either of them, by the said duke.

And the said Sir *Robert Mackreth* further pleaded in bar to the said cognizance, That the said sum of 14,000*l.*, in the said indenture and memorial mentioned to be paid to the said *Robert Mackreth* and *John Martindale* by the said duke, was not paid to the said *Robert Mackreth* and *John Martindale*.

And the said Sir *Robert Mackreth* further pleaded in bar to the said cognizance, That the said sum of 14,000*l.* in the said indenture mentioned, and by the said memorial alledged to have been paid by the said duke to the said *Robert Mackreth* and *John Martindale*, in fourteen notes of the Bank of *England*, of 1000*l.* each, and numbered as in the said memorial is mentioned, was not nor was any part thereof paid by the said duke in notes of the Bank of *England*.

Upon these three pleas issues were joined. At the trial a special verdict was found, which stated, That the said annuity of 2000*l. per annum* was purchased by the said duke of the said *John Martindale*, and that at the time the same was so purchased the said *John Martindale* was seised in his demesne, as of fee, of and in the reversion of the said mansion-house in which the said goods and chattels were taken, expectant on the determination of Sir *Robert Mackreth*'s estate therein; and that the said Sir *Robert Mackreth* was then, and at the time of the finding of the said verdict, seised of and in the same in his demesne, as of freehold, for the term of his natural life; and

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and that the annual value of the estate mentioned in and conveyed by the said indenture, at the time the said annuity was so granted, and from thence till the time of giving the said verdict, had not exceeded the sum of 1500*l.*; that the said Sir *Robert*, at the request of the said *John Martindale*, agreed to join with him the said *John Martindale* in charging the said annuity on the said estates of the said Sir *Robert;* and *John Martindale* and the said Sir *Robert* did accordingly join in and execute the said indenture; that the said 14,000*l.*, the consideration of the said annuity within mentioned, being the proper money of the said duke, were, at the time of the sealing and delivery of the said indenture by the said *John Martindale* and the said Sir *Robert*, paid in fourteen notes of the governor and company of the Bank of *England*, of 1000*l.* each, and numbered as in the said memorial is mentioned, and expressed to be payable on demand to the said *John Martindale* in the presence of the said Sir *Robert*, and by and with his privity, knowledge, and consent, by Mr. *Edward Lenn*, then a clerk of Messrs. *Coutts* and company, the said duke's then bankers and by the said duke's directions; that the said duke was not present at the time such payment was made, nor was the said indenture withinmentioned sealed and delivered by the said duke at the time of such payment; that the said Sir *Robert* and *John Martindale* signed a receipt for the consideration money, but that in fact the whole of the consideration money was then paid only into the hands of the said *John Martindale*, and to and for his sole use and benefit, though the said Sir *Robert* was present and assented to such payment at the time the same was made, he being merely party to the deed for the purpose of conveying his said life estate and interest in the said premises in which the said goods were taken, for securing the payment of the said annuity.

Judgment

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Judgment was given for the Defendant upon all the issues.

This judgment of the Court of King's Bench was founded on three objections to the validity of the said annuity,

First. Because it was stated in the said indenture of the 9th of *November* 1793, and in the said memorial, that the said sum of 14,000*l.* was paid by the said duke to the said Sir *Robert Mackreth* and *John Martindale*, whereas in fact it was paid by the said *Edward Lenn*, the agent of the said duke, and the said duke was not present when the said sum of 14,000*l.* was paid.

Secondly. Because it was stated in the said indenture of the 9th of *November* 1793, and in the said memorial, that the said sum of 14,000*l.* was paid to Sir *Robert Mackreth* and *John Martindale*, whereas in fact it was paid to the said *John Martindale* only, for his sole use and benefit.

Thirdly. Because it appeared by the said indenture of the 9th *November* 1793, that the said estates therein mentioned were conveyed to the said *Thomas Coutts*, upon divers trusts which are not specified or set forth in the said memorial.

To reverse this judgment of the Court of King's Bench, a writ of error was brought and the common errors assigned.

The Plaintiff in error prayed that the judgment might be reversed for the following, among other reasons:

With respect to the said first objection above mentioned, it is admitted that the Legislature meant by the annuity act 17 *G.* 3. *c.* 26., that there should be a memorial, which should be a faithful abstract of every grant of an annuity, and therefore the first section, which is the leading feature of the act, requires that there should in every case be a memorial, and also that that memorial should

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should contain the dates of all the assurances, the names of all the parties for whom they are trustees, the names of all the witnesses, the annual sum to be paid, the lives for which the annuity is granted, and the consideration for granting the same; all which it is insisted are accurately stated in the memorial of the present annuity. It is observable that this first section, though it requires the memorial which was undoubtedly intended to disclose every thing material in the deed, only requires the names of the parties, and for whom they are trustees, or in other words, by whom, and on whose behalf the transaction took place.

The third section, which relates only to the deeds, directs that they shall set forth the consideration, and the names of the persons by whom or on whose behalf it was paid, an expression which, by reference to the first section, which directed the form of the memorial, must be construed to mean, not the hand which paid the money, or laid the same on the table, which was not required in the memorial, but, agreeably to the first section, the person whose money was paid, or if paid out of one person's monies on behalf and for the benefit of another, the name of such other person. This appears to be the manifest meaning of the law, as contained in the third section, because undoubtedly the deed, which was secret and kept in the custody of the grantee only, could never be intended to be more explicit than the memorial which was a public clue to it; and the very use and intention of which was to register a public memorial of every thing which could appear by production of the deed itself, on pain of avoiding the grant, and surely therefore if the Legislature had intended that the very hand that paid, and not merely the person whose money was paid, should appear upon the face of the grant, it would have rather required it in the memorial which was public, than in the grant which was secret, or at all events in both, instead of

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of requiring it in the deed only, a provision frivolous and nugatory. When therefore the case of *Williams* v. *The Duke of Bolton*, reported in 2 *Ves. jun.* 138. and 4 *Brown's Ch. Ca.* 297., was insisted upon by the counsel in the case of *Dalmer* against *Barnard*, 7 *Term Rep.* 248., which was the first decision in the Court of King's Bench on this point, Lord Chief Justice *Kenyon* revolted at the argument of the counsel till they insisted on the authority, and his lordship said *qui facit per alium facit per se*, a maxim which occured also to the Barons of the Exchequer in a subsequent case, till the decision of *Williams* v. *The Duke of Bolton* was brought before them; a decision which both the Court of King's Bench and the Exchequer felt themselves bound by, on account of the respectability of the judges who decided it, and because the words of the statute were sufficient to bear the construction, though another construction might also be fairly put on it. The decisions therefore of the respective courts may be considered as resting entirely on the authority of the case of *Williams* v. *The Duke of Bolton*, above alluded to, and are not to be considered as the genuine opinion of the Judges of those Courts, or as containing any solid evidence of the true construction to be put upon the statute.

With respect to the second objection, it is submitted that the first section of the annuity act, so far as relates to this point, only requires the memorial to state the names of the parties to the transaction, the annual sum to be paid, and the consideration of the granting the annuity; Sir *Robert Mackreth* as well as *John Martindale*, was indisputably a party to the transaction, and the consideration of the annuity was 14,000*l.*, paid by the duke to *John Martindale*, with the concurrence and at the request of Sir *Robert*, who was present when it was paid; and though the jury have found that in fact the money was paid to *John Martindale* for his sole use, that fact might not be known to or on behalf of the duke at the time the money

money was paid, and it might then be supposed that as Sir *Robert* conveyed so considerable an estate for the purpose of securing the annuity, he was to participate in the consideration money; though the jury have found that the 14,000*l.* were paid to *John Martindale* alone, it does not follow but that shortly afterwards he paid a part of the consideration money to Sir *Robert* upon a pre-existing agreement between them; and indeed, supposing the case to be otherwise, yet as Sir *Robert* was an active party in the transaction, and did not merely volunteer his personal security, and the money was paid at his request, it might fairly be considered in the eye of the law, and in a formal conveyance, which uniformly contains technical expressions that the money was paid as well to Sir *Robert*, as to *John Martindale*. The same observations apply to the third section of the annuity act, which it must be also observed only requires the deeds to state the name or names of the person or persons by whom, and on whose behalf, and not to whom or on whose behalf the consideration was advanced.

With respect to the last objection, which arises out of the first section of the annuity act, requiring a memorial stating the names of all the parties, and for whom any of them are trustees, it is submitted that the statute only requires the memorial to state the grant of the annuity, or other charge, and for whose benefit is was made, as has been done in the present case, unless the deed granting the annuity convey some estate for other purposes, besides the securing the payment of the annuity, and where, after satisfaction of the annuity, the deed directs a beneficial interest in the premises to take place different to that which the grantor was entitled to at the time the annuity deeds were executed. Now in the present case it appears from the indenture of the 9th of *November* 1793, that the premises to which Sir *Robert* was entitled for life, remainder to *John Martindale* in fee, and the leasehold

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leasehold and other premises were conveyed to *Thomas Coutts* merely in trust, for securing the payment of the annuity; and though a term was carved out of the inheritance, and granted to the said *Thomas Coutts* for the term of ninety-nine years in trust, yet the trusts were common and incidental to the grant, and merely to secure the payment of the annuity; and after satisfaction of it, the trust was to enure for the benefit of the same person or persons as would have been entitled to the estate, if the annuity had never been granted. Therefore whether the decisions in *Dolman* v. *Dolman*, 5 *Term Rep.* 641. and *Hood* v. *Burlton*, 2 *Veseyjun.* 29. 4 *Br. Ch. Cas.* 121. are correct or not, the present differs materially from those cases, for there it appeared that the premises were conveyed in trust, not only to satisfy the annuity, as stated in the memorial, but also to pay other debts, or for other purposes not fully stated in such memorial, and consequently such annuity was void, because the memorials did not disclose all the beneficial purposes for which the annuity was granted. The present case more resembles the case of *Toldervy* against *Allan*, 5 *Term Reports*, 480. where the memorial was held sufficient. It is however submitted that there is no decision immediately bearing on this point, and that it is only to be considered what was the intention of the Legislature, which ought indeed to govern, though there may be express decisions of the courts repugnant to it,

In the above-mentioned case of *Hood* against *Burlton*, Lords Commissioners *Eyre* and *Ashhurst* held the annuity void, because the beneficial interests created by the grantor were not sufficiently stated; and a similar reason was certainly the ground of the Judge's decision in the above-mentioned case of *Dolman* v. *Dolman*; and in the case of *Toldervy* v. *Allan*, above alluded to, the court held that the first clause of the statute extended only to persons for whom trusts were created, observing that the Legislature

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Legislature did not mean to require the parties to mention all the trusts which were a lien on the estates, independently of the annuity, such as to pay taxes, &c. but only those which were created in consequence of the annuity being granted.

It is rather remarkable, that it does not appear from the reports of either of the cases on this point, that the spirit or intention of the Legislature was satisfactorily inquired into, and that the decisions appear to have been founded merely on the words of the statute.

It is admitted that the Legislature required a memorial stating the transaction, the better to protect the grantor, and enable him, by examining the memorial at any time, to discover and avoid a fraudulent transaction. The annuity act does not appear, from the framing of it, to have been passed in favour of creditors or persons not privy to the transaction. It certainly required all interests adverse, if they may be so termed, to that of the grantor, to be stated in the memorial; but it could not be necessary to state trusts or interests consistent with and in favour of his interest. In the present case, the memorial states the duke's right during his life to an annuity of 2000*l.*; this was the only interest and charge on the premises adverse to the grantor's interest, and is indisputably correctly stated in the deed and memorial. The powers of distress, &c. are notoriously created whenever an estate is conveyed for the purpose of securing the due payment of an annuity; and it is also as notorious that such conveyance is in no case absolute, entitling the grantee immediately to enjoy the premises, but the party conveying the estate is always at liberty to hold the same till default be made in payment of an annuity: it would therefore have been idle as well as unnecessary, in point of law, to have made a tedious detail of these provisions in the memorial; and though the deed directs how the trusts of the respective terms shall enure after satisfaction of

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of the annuity, it was unnecessary to notice such direction in the memorial, because it was in favour of, and not a beneficial interest adverce to the rights of the grantors; and also because, had the deed been silent and omitted the direction, the interest of the grantors would, after satisfaction of the annuity, have been the same as expressed in the deed.

T. ERSKINE.
JOHN LENS.
JOSEPH JEKYLL.

The Defendant in error hoped that the judgment of the Court of King's Bench would be affirmed for these, among other reasons:

Because, independant of the facts found by the special verdict, it appears upon this record, that the trusts contained in the annuity deed are not set out in the memorial; in which it is only stated that Mr. *Coutts* is a trustee for the duke: but nothing appears of the transaction between the parties, which it has been held, must necessarily be stated in the memorial. The trusts here are very material, they authorise the trustee to raise the arrears of the annuity if behind 60 days, by lease, sale, or mortgage, and to give the residue, after discharging the preceding trust, to the person entitled to the freehold of the premises charged. There is also a trust for the grantor, till default of payment.

These two last trusts bring the case within the express words of the act of Parliament 17 *Geo. 3. c. 26. s. 1.* which direct that the memorial shall contain "the names of all the parties, and for whom any of them are trustees." The memorial here does not state that Mr. *Coutts* was trustee for the grantor till default of payment, nor for the person entitled to the freehold of the premises, for the residue of the money for discharging the arrears of the annuity. The case of *Taylor* and *Johnson*, 8 *T. R.* 184. is precisely in point.

Upon

Upon the facts found in the special verdict, it appears,

First. That the deed does not state the name of the person by whom the money was actually paid.

The third section of the act requires this in express terms. "And also the name or names of the person or "persons by whom and on whose behalf the said con- "sideration, or any part thereof, shall be advanced." This defect has been held to avoid the deed so frequently and in so many of the Courts of *Westminster Hall*, that it would be of dangerous consequence to overturn the decisions; many of them are collected in *Dalmer* v. *Barnard*, 7 *T. R.* 248. They appear to be founded as well on the policy of the act as on its precise words.

Secondly. It appears also that there is no true statement, either in this deed or the memorial, of the person who received the money.

The real transaction appears to be this, That the annuity was purchased of *Martindale* alone; that *Mackreth* only consented to charge the life estate; that in truth he had none of the money, and no beneficial interest.

These are the *res gestæ*, as they are found by the special verdict. They are not set out in his memorial, nor could they be guessed at from any thing which appears there.

V. GIBBS.
S. ROMILLY.
H. DAMPIER.
O. MARKHAM.

This case was argued at the bar of the House of Lords by *Erskine* and *Lens* Serjt., on behalf of the Plaintiffs in error, and *Gibbs* and *Romilly* on behalf of the Defendants in error.

The following questions were, upon the motion of the Lord Chancellor, submitted to the Judges:

1st. Whether (attending to the effect of the indenture of release of the 9th of *November* 1793) the representation

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in the memorial, that "*Thomas Coutts* was a trustee nominated on the part of the Duke of *Queensberry*," was in law and according to the act of the 17 *G.* 3. *c.* 26. a sufficient representation of the person or persons for whom the said *Thomas Coutts* was a trustee, according to the effect of the said indenture?

2d. Whether, it appearing upon the record that the sum of 14,000*l.*, the proper money of the said duke, was paid in notes of the governor and company of the Bank of *England* by *Edward Lenn*, then a clerk of Messrs. *Coutts* and Co., the then bankers of the said duke, and by the said duke's direction, and that the said duke was not then present, and the said indenture having stated the consideration to be "the sum of 14,000*l.* of lawful money of *Great Britain* well and truly paid by the said duke," the several matters, required by the beforementioned act of parliament to be fully and truly set forth and described in words at length in every deed whereby an annuity shall be granted, as to the consideration and the payment of the consideration for such annuity, are set forth and described in the said indenture according to law?

3d. Whether, it appearing upon the record that at the time of the payment of such notes of the governor and company of the Bank of *England*, the same were paid to *John Martindale* in the presence of Sir *Robert Mackreth*, and by and with his privity, knowledge, and consent, and that the said *John* and Sir *Robert* signed a receipt for the consideration money, but that in fact the whole of the consideration money was then paid only into the hands of the said *John*, and to and for his sole use and benefit (though the said Sir *Robert* was present and assented to such payment at the time it was made, he being merely party to the said indenture, for the purpose of conveying his said life estate and interest on the premises), and the memorial having stated the consideration of the indenture of grant

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of the annuity to be 14,000*l.* paid to the said Sir *Robert* and *John*, and the consideration of the bond mentioned in the memorial being therein stated to be 14,000*l.* paid to the said *John*; does the memorial stated in the record duly and according to law set forth every deed, instrument, or other assurance, whereby the annuity is granted or attempted to be granted?

4th. Whether the annuity granted by the said indenture, being an annuity of 2000*l.*, thereby made payable on the 9th day of *May* and 9th day of *November* in every year, by even and equal portions, together with a proportionable part of the same, from the last of the said days of payment which shall happen next before the decease of the said Duke of *Queensberry*, up and home to the day of the decease, and the memorial stated on the record being a memorial of a grant of "one annual sum of 2000*l.*," does such memorial set forth the annual sum or sums to be paid according to law and the above statute?

On this day the opinion of the Judges was delivered by the Lord Chief Baron *Macdonald* on the 1st and 2d questions submitted to them by the House, upon which questions they were unanimously of opinion, first, that the memorial did not sufficiently state, according to the 17 *G.* 3. *c.* 26., for whom *Thomas Coutts* was a trustee; and 2dly, that the name of the person, by whose hand the consideration of the annuity was paid, ought to have been stated in the deed by which the annuity was granted.

After this opinion had been delivered by the Lord Chief Baron to the House, the Lord Chancellor again addressed the House, and suggested that though the answers of the learned Judges upon the 1st and 2d questions proposed to them were sufficient to decide this case, still it would be important to ascertain their opinions also upon the 3d and 4th questions proposed, as including most

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most of the difficulties arising out of the 17 *G. 3. c. 26.*, and accordingly moved that the 3d and 4th questions should be again proposed to the judges.

This was accordingly done, but no opinion has yet been delivered upon them.

THE END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Forty-fifth Year of the Reign of GEORGE III.

BAYLIS *v.* MANNING.

May 2d.

The Court refused to permit the Demandant in a writ of right to amend his count, by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the demandant having been mis-informed in the country, and that the Demandant would be barred, unless the amendment were allowed.

BAYLEY Serjt. moved to amend the count in a writ of right. The count stated the right to have descended from one *Robert Baylis*, last seised *to the demandant;* whereas in fact it descended to *John Baylis, the father of the demandant*, and from him to the demandant. An affidavit was produced, stating that inquiry had been made in the country respecting the title, and that the demandant had been mis-informed; in consequence of which the mistake in the count had arisen; and that unless the amendment were allowed, the demandant would be barred by the statute of limitations.

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But the *Court* refused to allow the amendment, saying that they considered this case as less favourable than the application in *Charlwood* v. *Morgan* (*a*), since the demandant here had commenced his action without knowing the title upon which it was founded, whereas the defect in the former case arose from a mere mistake of the pleader.

Rule refused (*b*).

(*a*) *Ante*, 64 (*b*) *Vid etiam Dumsday* v. *Hughes*, 3 *Bos. & Pull.* 453.

May 4th.

JUDINE, Assignee of a Bankrupt, *v.* DA COSSEN.

A trader, having a counting-house in town, and a dwelling-house in the country, left the former (to which he never returned), taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also. Held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day within the meaning of the 13 *Eliz. c.* 7. *s.* 1. and thereby committed an act of bankruptcy.

THIS was an action of trover, brought by the Plaintiff, as assignee of a bankrupt, to recover a quantity of *Russia* sheeting and blue cloth.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Hilary* term, it appeared that the bankrupt's only dwelling-house was at *Walworth*, but that he carried on his business solely at his counting-house in *Angel-Court*; that on *Friday* the 8th of *June*, he departed from his counting-house, to which he never afterwards returned, and took his books away with him; that on *Friday* night he slept at his house at *Walworth*, and continued to reside there till *Sunday* morning, when he went out, but returned again on *Monday* afternoon; that on *Tuesday* morning he finally left his dwelling-house; and that on *Saturday* the 9th of *June*, the wife of the Defendant called upon the bankrupt, at his house at *Walworth*, respecting a debt due from the bankrupt to the Defendant, in consequence of which the goods were delivered to her by the bankrupt on *Sunday* the 10th. The jury, under his Lordship's direction, found a verdict for the Plaintiff.

Vaughan

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Vaughan Serjt. now moved for a rule to shew cause why this verdict should not be set aside and a nonsuit be entered, insisting that, as the bankrupt did not leave his dwelling-house until *Tuesday* morning, the act of bankruptcy was not compleat until that time, and consequently the Defendant was entitled to retain the goods which were delivered on *Sunday*; that the words of the 13 *Eliz.* *c.* 7 *s.* 1. are "depart from his dwelling-house to the intent or purpose to defraud or hinder any of his creditors;" and that whatever might have been the intention of the bankrupt in leaving his counting-house on *Friday*, his act upon that day did not make him a bankrupt within the meaning of the statute.

SIR JAMES MANSFIELD Ch. J. I left it to the jury to determine whether, when the bankrupt left his counting-house, he left it with the intention never to return again; and the jury thought that he did. The case may perhaps be new in circumstances, but the question is this, Whether, when a trader, having a counting-house and carrying on business no where else, leaves that counting-house without the *animus revertendi*, he comes within the meaning of the words of the 13 *Eliz.* That statute is not confined to departing from the dwelling-house, but after the words depart the realm, or begin to keep house, it has this expression—"or otherwise to absent himself." Though therefore the case may be new, I can entertain no doubt upon it. If a man, who carries on business at a counting-house, goes away, taking all his books with him, without any intention of returning, though he may have a country-house at which he sleeps two or three nights afterwards, I think that he begins to absent himself from the time that he leaves his counting-house.

HEATH J. There appears to me to be very antient authority for considering a trader as bankrupt from the time

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that he leaves his counting-house. The term "bankrupt" is derived from the *Italian* expression "*Banco rotto*," and formerly when a trader left his place of business, the benches were broken, and he was declared a bankrupt.

ROOKE and CHAMBRE Justices being of the same opinion,

Vaughan took nothing by his motion.

May 7th.

ATTY *v.* LINDO.

Policy upon the freight of the ship *Stranger*, at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and discharge and take goods on board there. The Plaintiffs had agreed by charter-party that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as their agent should direct, and receive on board wine, and proceed to *Jamaica*, and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*, such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place, by *Madeira* wine at 40*l. per* pipe, to be carried in the said ship to *Jamaica* free of freight; the ship arrived at *Madeira*, and delivered all her *London* cargo, except 33 casks of coals, which the captain kept on board to stiffen the ship; having received part of his cargo for *Jamaica*, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables and run out to sea, where he was captured. Held that the Plaintiff was entitled to recover for a total loss.

THIS was an action on a policy of insurance, upon the freight of the ship *Stranger*, at and from London to *Jamaica*, with liberty to touch at *Madeira*, and discharge and take goods on board there. The cause was tried before *Chambre* J. at the *Guildhall* sittings after last *Michaelmas* term, when it appeared, that by a charter-party, dated the 10th *December* 1803, it was agreed between the Plaintiff as owner of the *Stranger*, and *J. S. De Franca*, as freighter thereof, that the ship should take in such goods at the port of *London* as the freighter should think proper, and procced therewith to the island of *Madeira*, and having arrived there, the commander should deliver all or such part of the goods shipped at *London* as the agents of the freighter should direct, and there receive on board the said ship, from the freighter or his agents, such quantity

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of wine as he or they should think proper; and having received the same, should proceed to *Kingston* in the island of *Jamaica*, and there make a true delivery of the cargo to the freighter or his agents. And it was further agreed by the said *J. S. De Franca*, that he should pay to the Plaintiff 135*l.* in full for freight or hire of the said ship during the whole of the said voyage from *London* to *Madeira*, and from thence to *Kingston* in *Jamaica;* such freight to be paid in *Madeira* aforesaid on a right and true delivery of the goods that might be shipped in *London* for that place, by *London* Particular *Madeira* wine at the rate of 40*l. per* pipe, which wine only, and the hogshead given to the master, should be carried in the said ship to *Jamaica* free of freight. The captain, being called as a witness, proved that the ship, having taken on board a cargo in the river *Thames*, consisting of bale goods, and a quantity of coals in old wine casks by way of ballast, set sail on the 2d of *February*, and arrived at *Madeira* on the 26th of that month; that about the 28th, the ship began to deliver her cargo, the whole of which, except 33 casks of coals, was discharged by the 7th of *March*, at which time 69 pipes of wine consigned to *London* (but not the wine by which the freight was to be paid) had been put on board; that the agents of the freighter were ready to receive the 33 casks of coals, but that they were retained on board by the captain to stiffen the ship until the rest of the cargo for *Jamaica* could be shipped; that on the 7th of *March* a gale of wind arose, which continuing till the 9th, the captain was obliged to cut his cables and run out to sea; that being driven to the westward, the ship fell in with a *French* privateer and was captured. The jury found a verdict for the Plaintiff for a total loss.

A rule having been obtained, calling on the Plaintiff to shew cause why the verdict should not be set aside and a new trial had; first, on the ground that the Plaintiff was not entitled to recover any thing; and secondly,

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that the Plaintiff was only entitled to recover for a partial loss,

Marshall and *Best* Serjts. now argued in support of the rule; first, the underwriter on freight only undertakes that the owner of the ship shall not be deprived of his right to freight by any of the perils insured against. If therefore the right to freight in this case had vested before the loss happened, and an action would have lain to recover it of *De Franca*, nothing which afterwards took place could divest that right, and consequently the assured would not be injured by the loss of the ship. By the terms of this charter-party, the right to receive freight was not made to depend, as in most other cases, upon the completion of the voyage, but was to vest upon a true delivery of the *London* cargo at *Madeira*. It is true that, when the loss happened, 33 casks of the *London* cargo remained undelivered. But if the delivery of these casks was prevented by the fault of *De Franca*'s agents, he must be answerable for their fault, and is liable to pay the freight; if by the fault of the captain himself, then he has broken the charter-party; if by unavoidable necessity, then the Plaintiff was justified; and all having been delivered which could be reasonably demanded, the right to freight vested. If the performance of the condition was either excused by necessity, or dispensed with by *De Franca*, an action might be maintained for the freight. Now shipping the wine before the delivery of the coals may be considered as a licence on the part of *De Franca* to detain the latter. On the other hand, if the Plaintiff was in fault, he has lost the freight by his own act. The charter-party makes no provision for retaining any part of the cargo by way of ballast. If ballast was wanted, the Plaintiff should have taken it out; and if he withheld the coals contrary to the charter-party, it was by his own act that the freight was prevented from vesting. Secondly, The

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The Plaintiff can only recover for the loss of freight from *Madeira* to *Jamaica*. The freight in this case is reserved upon the whole voyage from *London* to *Madeira*, and from *Madeira* to *Jamaica*; but wherever a voyage is divisible, freight may be apportioned. This voyage is divisible, both by the terms of the charter-party, and the nature of the trade. In *Siderfin*, 236. it is said, that if a ship go from one port to another, and there unload, and in her passage to a third place be lost before her second unloading, the owner shall only recover freight for the first loading and unloading. The case of *Luke v. Lyde*, 2 *Burr.* 882. 1 *Black.* 190. also clearly shews, that where goods are carried to a certain point only, and received by the freighter, the owner may recover freight *pro ratâ itineris*. In this case, therefore, the jury ought to have apportioned the freight, and to have deducted so much as was earned by the carriage from *London* to *Madeira*.

Shepherd and *Bayley* Serjts. *contrà*. First, it may be admitted, that if the Plaintiff be entitled to recover of *De Franca*; this action cannot be supported. The delivery of the *London* cargo is a condition precedent which has not been performed, and there is no evidence from which it can be inferred that the delivery was prevented by the fault either of the Plaintiff or *De Franca*. The casks of coals were retained on board in the ordinary course to keep the ship right until the remainder of the *Madeira* cargo should be delivered; but until the whole *London* cargo was unshipped, the condition was not performed, and the right to freight did not vest. The case of *Cutter* v. *Powell*, 6 *Term Rep.* 320. is a clear authority to shew that where the benefit of a contract is made to depend upon the performance of a condition, nothing can be recovered unless that condition be performed, though such performance were prevented by the act of

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God. In the present case, however, it may be observed that this is not a mere insurance that the assured shall have a right to freight, but it is an insurance on the freight till the freight-wine is put on board at *Madeira*, and afterwards on the freight-wine itself until its arrival at *Jamaica*. And as the assured have been prevented by the perils insured against from receiving the wine on board their ship, they are entitled to recover. Secondly, This is not a partial, but a total loss; the contract in this case is entire on one voyage from *London* to *Madeira*, and from *Madeira* to *Jamaica*, and cannot be severed. Where the contract is express and entire, the freight cannot be apportioned. This was decided in *Cook* v. *Jennings*, 7 *Term Rep.* 381. in which case the distinction between express and implied contracts was taken, and the case then before the Court, which was founded on a charter-party, was distinguished from that of *Luke* v. *Lyde*, which was an action of *indebitatus assumsit*.

Sir JAMES MANSFIELD Ch. J. This is a motion for a new trial, on the ground, first, that the Plaintiff is not entitled to recover any thing, and secondly, that he is only entitled to recover for a partial loss. There is nothing particular in the terms of the policy; but in order to understand the real subject of insurance, we are obliged to refer to the charter-party, from which it appears, that the subject-matter of insurance is of a very singular nature. Generally speaking, an insurance on freight is nothing more than an undertaking that the owner of the ship shall not be prevented by any of the perils insured against from having a right to recover freight from the persons who have bound themselves to pay it; but this is not only an insurance that the owner shall be in a condition to demand his freight, that is, that the ship shall be in a state to receive a payment in *Madeira* wine at *Madeira*, but also that the wine so received shall, notwithstanding the perils insured against,

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against, be safely carried to *Jamaica*. This must be the nature and effect of the insurance, otherwise if the *London* cargo were carried to *Madeira* and there delivered, and then the freight paid in wine, if the ship were afterwards lost, the owner would lose his freight by the perils insured against, and yet not be protected by the policy. It seems to be admitted, therefore, that the insurance must extend to protect the wine when on board, as well as the right to receive it; and I believe that this sort of insurance is continually made and well understood in the city of *London*. In order to judge of the question, we must look at the charter-party, by which it is agreed that *De Franca* shall pay to the Plaintiff the sum of 135*l.* in full for freight by the said ship during the whole of the said voyage from *London* to *Madeira*, and from thence to *Kingston* in *Jamaica*; which freight is to be paid in *Madeira*, on a true delivery of the goods shipped in *London*, by *Madeira* wine at 40*l.* *per* pipe, which wine is to be carried in the ship to *Jamaica* free of freight. The charter-party, therefore, treats the whole as one voyage from *London* to *Jamaica*, touching at *Madeira*. The freight for the whole voyage is to be paid in one gross sum, and that sum is to be paid in *Madeira* wine, valued at a certain sum, at *Madeira*; the payment, therefore, is local and indivisible, and on payment of the freight in *Madeira* wine, the wine is to be carried in this particular ship in the particular voyage from *Madeira* to *Jamaica*. The intention of the parties to the policy was to insure the object of the voyage, part of which was to carry to *Jamaica* the wine paid for freight. On the arrival of the ship at *Madeira*, the captain proceeded to unload. It appears that there were persons ready to receive the coals, but that the captain, consistently with the safety of the ship, could only deliver them as he received the wine on board. There is no evidence that he was prevented from getting the wine on board by the neglect of *De Franca*,

or

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or that the captain himself was guilty of delay in taking out the coals. Before all the coals could be delivered, a storm arose; the ship was captured, and a total loss ensued, upon which an action is brought against the underwriter. No *Madeira* wine was or could have been delivered on board the ship for freight; I say no wine could have been delivered for freight, because it is not proved that any person was guilty of delay. Without any fault being imputable to any one, an accident happened, which rendered it impossible for the captain to receive the freight at *Madeira*. Then why may he not recover it from the underwriters? While the ship was at *Madeira*, she was, in the course of the voyage insured at and from *London* to *Jamaica*, taking *Madeira* in the way; and the owner was to receive the freight at *Madeira* to be carried in the intended voyage to *Jamaica*. The owner, therefore, was deprived of his freight by perils insured against by the policy. But it is said that the loss can only be partial, because the owner has a right to receive freight for so much of the voyage as was at an end. But the terms of the charter-party afford a complete answer to that objection. How can we apportion the freight, when the terms of the policy exclude any demand for a part of the voyage? A certain sum is to be paid in wine to be carried to *Jamaica* free of freight for the whole voyage. This is not like an agreement to pay money for time or for distance; it is impossible that the owner in this case should be intitled to receive any thing for having performed a part only of the voyage. I see no reason, therefore, why the verdict of the jury should be reduced.

HEATH J. There are two questions in this case. First, Whether the Plaintiff be entitled to recover any thing? Secondly, Whether he be entitled to recover for a partial or a total loss? This is an action upon a policy on freight. As soon as the ship broke ground at *London* an inchoate right

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right to freight attached, and the loss which happened is within the policy. The Plaintiff, therefore, is entitled to recover, unless some reason to the contrary can be shewn. It is said that either *De Franca*, or the captain, was guilty of neglect; but the underwriters do not know to which the neglect is to be imputed. I never heard of neglect being set up as a defence, without specifying some person to whom it was to be imputed. The jury, however, have exercised their judgment upon this subject, which was a matter of fact, and no blame is therefore to be imputed to either. The only remaining question then is, Whether the Plaintiff be entitled to recover for a total loss; and I see no pretence for considering the loss which has happened as a partial loss. The voyage was not divisible. I remember a case in the King's Bench, where a ship, laden for *Newfoundland*, was to discharge her cargo there, and buy fish to be carried to the *Italian* market; and the Court thought that the whole was but one voyage. In the present case, I think it impossible to make any modification of the freight.

ROOKE J. I am of the same opinion. With respect to the first point, whether the Plaintiff be entitled to recover at all, I think that his right to recover may be stated shortly. He has been prevented from earning freight, not by his own default, or that of the captain, but by the perils insured against. He is therefore, entitled to recover something, and if any thing, why not the whole? Under the words of this charter-party, I think it impossible to apportion the freight. If the agreement had been merely to pay a sum of money, possibly some means of apportioning might be found; but here the freight was to be paid, not merely by putting a certain quantity of *Madeira* wine on board the ship, but it was part of the stipulation, that such wine should be carried free of freight

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freight to *Jamaica*. I do not see, therefore, how that sort of freight can be apportioned.

CHAMBRE J. I am entirely of the same opinion. All the facts of the case were left to the jury, and I do not see how they could entertain any doubt. It was necessary to the safety of all persons concerned, that some part of the outward cargo should be left on board. Indeed, if there had been some negligence in delivering the outward cargo, I do not know that it would affect this policy; for if the freight-wine had been put on board, it would have been blown out and captured. As to the divisibility of the voyage, I do not think that much reliance was placed on it at the trial, since no evidence was offered to enable the jury to say how much ought to be deducted. Suppose no goods had been sent to *Madeira*, yet the freighter must have paid the whole freight agreed upon. How then are we to ascertain what sum the Plaintiff ought to receive for the use of the ship from *London* to *Madeira*? It seems to me that this case differs materially from those in which a division has been permitted, and that the verdict is quite right upon both points.

Rule discharged.

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(IN THE EXCHEQUER CHAMBER.)

BARNARD *v.* N. GOSTLING and G. GOSTLING, in Error.

May 8th.

THE Plaintiff declared in debt for certain penalties in the Court of *King's Bench*, and obtained a verdict on the 3d, 12th, and 15th counts of his declaration, which were similar in form, though for different acts done by the Defendants. The 3d count alleged, that "*Nathaniel Gostling* and *George Gostling*, not regarding the statutes in such case made, &c. on &c. at, &c. did in their own names as proctors of the Prerogative Court, &c. and for and in expectation of gain, fee, and reward in the said Court, &c. extract the probate of a certain will and codicil of one *J. K.* deceased, without having obtained and entered any such *certificate* or *certificates* as in and by the statutes in such case made is directed *contra formam*, &c., whereby and by force of the statutes, &c. the said *Nathaniel* and *George Gostling* then and there forfeited for their said last-mentioned offence 50*l.* *et actio accrevit*," &c. The Court of King's Bench upon motion arrested the Plaintiff's judgment. *Vide* 2 *East*, 569.; and the following judgment was accordingly entered up; "whereupon all and singular the premises being seen and read by the Court here, and full deliberation thereupon being had, because it seems to the Court here that the said third, twelfth, and fifteenth counts of the said declaration, in manner and form above made, and the matters therein contained, are not sufficient in law &c. Therefore it is considered that the said *George Barnard* take nothing by his writ and declaration aforesaid, and that the said *George Barnard* be in mercy for his false complaint against the said *Nathaniel* and *George Gostling* for

A common informer may recover penalties against a proctor for acting as such, without having obtained and entered his certificate under 37 G. 3. *c.* 90. But two proctors cannot be sued together as for one offence in not having obtained and entered their certificate.

Quære, Whether it be not bad to sue under the statute for not having *obtained and entered* a certificate without distinguishing which of those two omissions the person sued has been guilty of?

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for the residue of the said sum of nine hundred pounds, whereof the said *Nathaniel* and *George Gostling* are acquitted. And the said *Nathaniel* and *George Gostling* go thereof without day," &c.

Upon the above judgment the Plaintiff brought his writ of error in this Court: and the principal error assigned was, "that although the several penalties in the said several counts of the said declaration mentioned, and thereby alleged to have been forfeited by the said *Nathaniel* and *George Gostling*, by the committing of the several offences in those counts respectively mentioned, are by the statutes in that case made and provided, given and applied to the use of the person who sues for the same. And although the said *George Barnard* has sued for the same as aforesaid, and the jurors of the jury whereof mention is in the same record made have found that the said *Nathaniel* and *George Gostling* are guilty of the premises in the said third, twelfth, and fifteenth counts of the said declaration mentioned, yet by the judgment aforesaid it is considered that the said *George Barnard* should take nothing by his writ and declaration aforesaid, and that the said *Nathaniel* and *George Gostling* should go thereof without day."

Before the argument had proceeded far, Sir *James Mansfield* Ch. J. intimated, that upon the point on which the assignment of error proceeded this case was governed by the case of *Davis* v. *Edmonson*, 3 *Bos. & Pull.* 382., where a similar question had been discussed and decided by this Court, and that consistently with that decision this judgment of the Court of *King's Bench* must be reversed, unless it could be sustained upon other objections to the Plaintiff's recovery than that upon which the judgment proceeded. His Lordship then called upon the counsel for the Defendants in error to state such other objections to the Plaintiff's recovery as he meant to rely on.

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Dampier for the Defendants in error. There are two objections to the counts in the declaration upon which the Plaintiff has obtained his verdict; 1st, the two Defendants are thereby charged with the commission of a joint offence, which is several in its nature, and is made by the acts imposing the penalties in question. The declaration charges them jointly with having acted as proctors without having obtained and entered their *certificate* or *certificates*, without distinguishing which of them has not obtained and entered his certificate. If two proctors act jointly as such, without having complied with the requisites of the statutes, each will be liable, in consequence of such joint act, as for a several offence. If a penalty be recovered, one of the two defendants ought to be protected from being again sued for the same act. Which of the two then would be enabled, by a judgment in this action, to protect himself against any future suit, or how would *N. Gostling* be better entitled than *G. Gostling* to plead such recovery, or *G. Gostling* than *N. Gostling*? The case of *Hardyman* v. *Whitaker*, cited by Mr. Justice *Lawrence*, 2 *East*. 573. does not apply to this, because, though several persons may be jointly guilty of killing game, several persons cannot be jointly guilty of acting as proctors without a certificate, when each is severally liable to a distinct penalty for so doing. If each of several partners be not severally liable to be sued for a joint act, where none of them has obtained and entered his certificate, the consequence will be, that one certificate must be held sufficient for any number of persons acting in partnership. In *The King* v. *Clarke*, *Cowp*. 610., where three defendants in one information were found to have severally forfeited the sum of 40*l*. for assaulting and resisting certain custom-house officers in the execution of their duty, and rescuing out of their custody a quantity of brandy, on a motion in arrest of judgment, because the offence was entire, and only one

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sum of 40*l.* forfeited by the Defendants jointly, Lord *Mansfield* thus lays down the rule: "Where the offence is in its nature *single*, and cannot be severed, there the penalty shall be only single; because, though several persons join in committing it, it still continues but one offence. But where the offence is in its nature several, and where every person concerned may be *separately* guilty of it, there each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others, and each is punishable for his own crime." Now if several partners act as proctors without obtaining or entering their respective certificates, the joint act makes each of them liable to a several penalty. In *The King* v. *Clarke*, Lord *Mansfield* mentions the offences of impounding a distress in a wrong place, under the 1 *& 2 Ph. & M. c.* 12., and of destroying the game contrary to 5 *Ann. c.* 14., both of which he admits to be in their nature joint, though several concur in the offence. It was held in *Brookes'* case, 2 *Roll. Abr.* 81. tit. *Indictment, pl.* 6. and recognized in *Regina* v. *Atkinson & al.* 1 *Salk.* 382. by *Holt* Ch. J. that two could not be indicted jointly for exercising a trade not being educated in it as apprentices, because the forfeitures are distinct. So in this case the forfeitures of the two Defendants are distinct. 2dly, The counts in this declaration charge the Defendants with two offences, *viz.* the not having obtained and entered their certificate, and yet claim only one penalty, not distinguishing whether they have offended in not having obtained or not having entered their certificates. It so happens that the penalties for not having obtained and for not having entered the certificate, are created by the same act. But suppose them to have been created by different acts and to have been penalties of different amounts, *viz.* one of 5*l.* and the other of 50*l.*, how could it have been ascertained on those counts for which offence and for which penalty the action was commenced? The counts, therefore,

fore, are altogether uncertain, and cannot be sustained on this ground.

Lawes for the Plaintiff in error. When this case was before the Court of King's Bench, Mr. Justice *Lawrence* said, if it were necessary to decide the point as to whether the Defendants could be charged jointly for the recovery of the penalties, it was governed by the case of *Hardyman* v. *Whitaker*, of which he then read a MS. note. Indeed the objection, if available at all, is not available in this stage of the proceedings, but is cured by the finding of the jury, by which the act complained of appears to have been the joint act of the two Defendants. But the penalty attaches on the act done by the Defendants, and if both have done but one act, both are liable to one penalty only. In *The King* v. *Bleasdale*, 4 *Term Rep.* 809. it was held, that two persons could not be convicted in separate penalties for using a greyhound to destroy game. And in *The King* v. *Clarke*, *Cowp.* 612. Lord *Mansfield* admitted that two, three, or four persons might be joined in an indictment for impounding a distress in a wrong place, it being but one offence, though several were concerned. How then do those cases differ from this? Here though the two Defendants as partners were concerned in each act for which a penalty is claimed, yet each act constitutes but one offence, and consequently subjects the two to one penalty only.

Sir James MANSFIELD Ch. J. This action is founded on the 37 *G.* 3. *c.* 90., and the words of the 30th section by which the penalty is created, are, "if any person shall in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings in any of the courts for or in expectation of any gain, &c., or shall do any act in any of the said courts

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as an attorney, &c., proctor, &c., without obtaining a certificate in the manner herein before directed, or without entering the same in one of the courts aforesaid, &c. every such person shall for every such offence forfeit and pay the sum of 50*l.* &c." The first thing to be considered in this case is, whether if any given number of persons unite in partnership as proctors or attornies, the act of each partner is not the act of all the partners? If so, and of that there can be no doubt whatever, the 37 *G.* 3. *c.* 90. makes "every such person" liable to a penalty. The counts in this declaration upon which the Plaintiff obtained his verdict state, that the Defendants did in their own names as proctors of the Prerogative Court extract the probate of a will, and it must now be taken to have been proved that they did so. If then these Defendants are both proved to have acted as proctors without having obtained and entered their certificates, can it be doubted that each is liable to a penalty of 50*l.*? Indeed it is very doubtful how far the counts in this declaration can be sustained, as not having alleged distinctly whether the offence was committed when neither of the Defendants had obtained and entered a certificate, or when one only had omitted to obtain and enter his certificate. Nothing however is more clear than that no person can by law be convicted of an offence, but with this consequence also, that he may be enabled to plead the record of such conviction in case he should be again impleaded for the same offence. Now let us suppose either of these Defendants to be again impleaded separately for the same offence, for which both have now been sued jointly by the Plaintiff, how would it be possible for such person to plead the recovery in this suit? If indeed only one penalty can be recovered for the joint act of both Defendants, then such recovery would protect both; but the consequence of such a rule would be, that 10 persons might be joined in a suit as Defendants, in order to save

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15 penalties by the payment of one penalty for the joint act of all. The absurdity of such a consequence is sufficient to sustain the objection made to the mode of declaring adopted in this case, and to induce the Court to affirm the judgment. In the Court of King's Bench this objection was not fully considered, and the only opinion thrown out there upon it was founded upon the cases decided on the game laws. There, though several persons join in using a greyhound or killing a hare, still there is but one act done by all. In this case, though several partners may do but one act, yet each of those persons acts as a proctor, and for so acting as a proctor, without obtaining and entering his certificate, each is separately liable to a penalty. The decisions on the game laws therefore do not govern this case.

Per Curiam, Judgment affirmed.

FORSYTH *v.* MARRIOTT and GROVER, Bail of CLARK.

May 9th.

If the principal be actually in the custody of the sheriff at the time when the latter, at the instance of the Plaintiff, returns *non est inventus* to a *ca. sa.*; the Court will set aside such return, together with all subsequent proceedings against the bail, and order the money levied under an execution to be returned to them.

THIS was a rule to shew cause why the return of *non est inventus*, made by the sheriffs of *London* against the Defendant in the original action, and all proceedings against the bail subsequent to such return, should not be set aside, and the money levied under the execution against the bail restored.

It appeared that a writ of *ca. sa.* had been sued out by the Plaintiff against the original Defendant, and left at the sheriffs' office with directions to return *non est inventus*, though the Defendant was at that time actually in the custody of the sheriffs in the prison of *Ludgate*; that such return having been made, an action was brought

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against the bail, judgment entered up, execution sued out, and the money levied.

Best Serjt. shewed cause and insisted that the return was made at the peril of the sheriff, who was liable to an action if it proved to be false, and that the Court therefore ought not to interfere upon motion.

Bayley Serjt. *contrà* observed, that in this case the return was the act of the Plaintiff, by whose directions it was made; and that he was not entitled therefore to take advantage of it as the act of the sheriff.

Per Curiam. It is the common practice, when a Plaintiff intends to proceed against the bail, to carry the *ca. sa.* to the sheriffs' office, and give directions to have it returned *non est inventus*, without knowing whether the Defendant be in custody or not. But as it now appears that the Defendant was actually in custody at the time when this return was made, the bail have been injured, and the return must be set aside.

Rule absolute *(a)*.

(a) Vid. Tidd's Pr. vol. 2. p. 993. ed. S. n. q.

May 13th.

CHAMPION and Another *v.* PLUMMER.

A note or memorandum in writing of a contract for the sale of goods, signed by the seller only, is not a sufficient memorandum within the meaning of the statute of frauds.

THIS was an action against the Defendant for not delivering to the Plaintiffs 20 puncheons of treacle bought of him by the Plaintiffs at *37s. per cwt.*, to be delivered on the 10 of *December*; 20 puncheons at *36s.* 6*d.*

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6*d*. *per cwt*., to be delivered on the 31st *October*; and 10 puncheons at 37*s*. *per cwt*., to be delivered on the 1st of *November*.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Hilary* term, it was proved that a bargain for the treacle in question was made between the Plaintiffs' clerk and the Defendant, as stated in the declaration, and that the following note was made by the Plaintiffs' clerk in a common memorandum book, and signed by the Defendant, as under:

Left leaf of the book.	Right leaf of the book.
" Bought of *W. Plummer*	
20 puncheons of treacle 37/0	10 puncheons *a* 37.
to be delivered by 10 *Dec*.	
(Signed) *Wm. Plummer*.	
20 puncheons treacle 36/6	
say 37/0.	
1 *Nov*.	
31 *Oct*. *Wm Plummer*.	"

On the part of the Defendant it was objected, that this did not amount to a sufficient note or memorandum of the contract within the statute of frauds 29 *Car*. 2. *c*. 3. *s*. 17., as it was not signed by the purchaser; and his lordship being of this opinion, nonsuited the Plaintiff.

A rule having been obtained, calling on the Defendant to shew cause why the nonsuit should not be set aside and a new trial had,

Shepherd Serjt. shewed cause and insisted that it did not appear by the memorandum who was the buyer of the goods, and, as it was not signed by the buyer, he could not be bound by it, consequently the Defendant ought not to be bound by an agreement which would not bind the other contracting party. With respect to the case of

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Sanderson v. *Jackson*, 2 *Bos. & Pull.* 238., which was referred to on moving for the rule, he observed, that upon reference to the brief in that cause, it appeared that the name of the purchaser was stated in the bill of parcels, though that circumstance is not mentioned in the report, the case having turned entirely upon the sufficiency of the vendor's signature.

Best Serjt. *contrà* urged that the expressions of the statute "some note or memorandum in writing of the bargain to be made and signed by the parties to be charged by such contract," did not require the agreement to be reduced to writing in regular form, and that it was sufficient if the party to be charged in the action, by the production of the memorandum, had signed it, although it was not signed by the other party.

Sir JAMES MANSFIELD Ch. J. How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note, it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the Plaintiffs; there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain.

The rest of the Court concurring,

Rule discharged (*a*).

(*a*) But it seems that a contract for sale of an interest in land need only be signed by the party sought to be charged thereby, under the fourth section of the statute of frauds. *Vid. Seton* v. *Slade*, 7 *Ves. jun.* 275, and what is said of that case by Lord *Ellenborough* in *Wain* v. *Walters*, 5 *East*, 16.

EMMETT *v* LYNE. *May* 13th.

If a Plaintiff sue for assault, battery, and imprisonment, but only prove an imprisonment, and obtain one farthing damages, a certificate of the Judge, under the 43 *Eliz. c.* 6. will deprive him of costs.

THE Plaintiff in this case declared for an assault, battery, and imprisonment, and at the trial, a trifling imprisonment having been proved, but no battery, the Plaintiff obtained a verdict with one farthing damages. Upon this Sir *James Mansfield*, Ch. J. before whom the cause was tried, certified under the 43 *Eliz. c.* 6. to deprive the Plaintiff of his costs.

Best Serjt. in the course of last term moved that the Plaintiff might be entitled to his full costs notwithstanding the certificate, and now on the argument of the case insisted that every imprisonment included a battery, for which he cited *Bull. Ni. Pri. c.* 4. *p.* 22. *ed.* 2., and consequently the Plaintiff could not be deprived of his costs by a certificate under 43 *Eliz. c.* 6. He also cited *Truscott* v. *Carpenter*, 1 *Ld. Raym.* 229., where the Court say, "imprisonment upon legal process includes a battery." [*Chambre* J. In that case the Defendant justified assault, battery, and false imprisonment under a legal arrest, and the Court say, the Defendant in answer to a battery alleged ought to shew a necessity for the battery, for that a right to arrest does not give a right to commit a battery in all cases, though it may in some. The case of *Williams* v. *Jones*, 2 *Stra.* 1049. is to the same effect.]

Shepherd Serjt. *contrà* was stopped by

The Court, who said, that they had looked into the cases upon this point, and were clearly of opinion that the Plaintiff was deprived of his costs by the certificate; they referred to the case of *Walker* v. *Robinson*, 1 *Wils.* 93. 2 *Stra.* 1232. S. C. and observed, that it was absurd to

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contend that every imprisonment included a battery, and that all that was said in *Co. Litt.* 253. which was cited in support of that proposition in *Bull. Ni. Pri*, was that "imprisonment is a corporal damage."

Rule discharged.

May 16th.

HOPLEY *v.* GRANGER.

The Court will not open the rule for an attachment on the mere affidavit of the party, that he has not been served; at least unless he shew some mistake in the service.

LENS Serjt, having obtained an attachment against the Defendant for not complying with the prothonotary's *allocatur* upon the usual affidavit of service;

Best Serjt. now moved to open the rule upon an affidavit of the party himself stating that he had never been served.

But *the Court* said, that on motions for attachment, where service of process has been sworn to, the Court will not set aside the attachment upon the oath of the party himself that he has not been served, unless he can also shew that some mistake has been made in the service, as that one person has been served for another; and that as process is generally served without a witness, it would lead to the greatest inconvenience if a different rule was to prevail.

Best Serjt. took nothing by his motion.

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ELLIS *v* MORTIMER. *May* 20th.

THIS was an action to recover the sum of thirty guineas, as the price of a horse sold by the Plaintiff to the Defendant.

A. having a horse to sell, agreed to let *B.* have him for 30 guineas, if he liked him, and that he should take him a month upon trial: *B.* accordingly took him, and kept him about a fortnight, and then told *A.* he liked the horse, but not the price; and *A.* desired him, if he did not like the price, to return the horse; *B.* however kept him 10 days more, and then returned him; but *A.* refused to receive him, and brought an action on the contract for 30 guineas, the price of the horse. Held that he could not maintain such action.

At the trial before *Chambre* J. at the *Guildhall* sittings after last *Hilary* term, it appeared that the Plaintiff having a horse to sell, offered him to the Defendant, and it was agreed that the Defendant should give thirty guineas for the horse if he liked him, and should take him for a month upon trial: that the Defendant having accordingly taken the horse and kept him for about a fortnight, told the Plaintiff, upon being asked how he liked the horse, that he liked the horse but not the price; upon which the Plaintiff desired, that if the Defendant did not like the price he would return the horse: that the Defendant after this kept the horse 10 days, and then sent him back, the month originally agreed upon for trial not being expired; but that the Plaintiff refused to receive him.

The learned Judge told the jury that it was not competent to the Plaintiff to vary the time of trial originally agreed upon, but that if it could be inferred that the old agreement for a month's trial was put an end to, and a new agreement to take the horse was made, the Plaintiff was entitled to a verdict. The jury found a verdict for the Plaintiff.

A rule having been obtained calling on the Plaintiff to shew cause why the verdict should not be set aside, and a new trial granted,

Best Serjt. now shewed cause, and insisted that the Defendant by keeping the horse after the conversation between himself and the Plaintiff had made the horse his own, it being evident that he had made up his mind at the

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the time of such conversation, and that he did not therefore keep the horse afterwards for the purpose of trial: that the Defendant having improperly detained the horse under pretence of trial, the verdict was consistent with the justice of the case, and that the Court therefore would not disturb it, even if they should think in strictness that the Plaintiff had not pursued the proper form of action.

Shepherd Serjt. *contrà* urged, that by the original agreement the Defendant was entitled to keep the horse on trial for a month, and that the Plaintiff had no right to require a return, if the Defendant did not like him before the expiration of that time; that the verdict therefore was contrary to the evidence, the Defendant having returned the horse within the month.

Sir JAMES MANSFIELD Ch. J. This is not a very important case, but I cannot say that the verdict is warranted by the evidence. The action is founded on a contract; not upon the unjust detention after the conversation between the parties. The first question then is, what was the contract? It was agreed that the horse should be sold for 30 guineas, but that the Defendant should have a month's trial, and should be at liberty to return him at the end of the month if he did not like him, If indeed the Defendant had made up his mind not to buy the horse at the time when the conversation took place, it was a very unhandsome thing to keep him to the end of the month. But still that was the contract. The effect of the contract seems to me to be, that the Defendant shall have to the end of the month to judge whether he likes the horse at the price. It is possible that he might not like the horse at the end of the week, and yet might be willing to give the whole price at the end of the month. The Plaintiff having brought his action on the contract,

and

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and the Defendant having offered to return the horse, I do not think that the action can be supported; the Defendant is therefore entitled to a new trial.

HEATH J. I am of the same opinion. The Defendant, if he pleased, had to the end of the month to decide whether he would return the horse, though it was in his power to determine the contract earlier, by returning the horse sooner. In the fluctuations of his mind he might not like the horse at one time, and might at another; and he had not determined the contract until he had actually returned the horse.

ROOKE J. I am of the same opinion. I consider this as a contract for a month's trial; and that being so, the party had a right to take into his consideration for a month, not only the goodness of the horse, but his goodness with reference to the price.

CHAMBRE J. In my opinion the original contract was entirely determined, and the Plaintiff cannot say that it was determined for one purpose and not for another. If the contract was entirely determined, and the Defendant afterwards chose to detain the horse, the Plaintiff should have brought an action of trover. In either way therefore of considering the case, whether the original contract subsisted or was determined, the Defendant is entitled to a new trial. Perhaps the jury were in some degree misled by my observations.

Rule absolute.

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May 20th. JOHN VICKRIS TAYLOR (surviving Partner of FREEMAN HARTFORD, deceased) *v.* RICHARD HARE.

A., having obtained a patent for an invention of which he supposed himself the inventor, agreed to let *B.* use it upon payment of a certain annual sum secured by bond; this sum was paid for several years, when *B.*, discovering that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received, to recover back the amount of the annuity paid. Held that he could not recover.

THIS was an action for money had and received, which came on to be tried before the Lord Chief Justice at the sittings after last *Hilary* term, when a verdict was found for the Plaintiff for 425*l.*, subject to the opinion of the Court upon the following case:

On the 12th of *September* 1791 the Defendant took out a patent for the invention of an apparatus for preserving the essential oil of hops in brewing. By articles of agreement, dated 5th of *November* 1792, (which were set out at length at the end of the case) and made between the Defendant of the one part, and the Plaintiff and his said late partner of the other part, reciting the Defendant's patent, and that it gave him the sole power, privilege, and authority of using, exercising, and vending his said invention for the term of 14 years, the Defendant granted to the Plaintiff and his said late partner the privilege of making, using and exercising the said invention for the residue of the said term of 14 years, and in consideration thereof the Plaintiff and his partner covenanted that they would secure to be paid to the Defendant during the said term an annuity of 100*l.*, and would give their bond for that purpose, and a bond was accordingly given, conditioned for the payment of the said annuity. The Plaintiff and his said late partner used the apparatus (for the making and preparing of which they paid a distinct price) from the date of the said agreement until the 25th day of *March* 1797, and during all that time regularly paid the said annuity to the said Defendant. The Defendant was not the inventor of the invention for which he obtained his

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his patent. The invention was not new as to the public use and service thereof in *England*, but it was the invention of one *Thomas Sutton Wood*, and had been publicly used in *England* by said *Wood* and others before the Defendant obtained his patent. But the patent had never been repealed. The amount of the annuity which they had paid was 425*l*. If the Court should be of opinion that the Plaintiff was entitled to recover back the money which was paid on the bond, the verdict was to stand. If the Court should be of a contrary opinion, a nonsuit was to be entered.

Bayley Serjt. for the Plaintiff. To support the present action it is not necessary to prove that any imposition has been practised. If it appear that the Plaintiff has received nothing in return for the money which he has paid, he is entitled to recover back his money in this form of action. He was induced to pay his money upon the supposition that the Defendant had the power of communicating some privilege. But as it now appears that the Defendant's invention was not new, and that the patent was therefore void, the consideration upon which the Plaintiff paid his money has wholly failed, and the Plaintiff has derived no benefit whatever. Where an estate is conveyed, the vendor professes to convey nothing but his title to that estate. But here the thing itself which was the subject of the agreement had no existence. It was the understanding of all parties that the Defendant was entitled to a patent-right; but it now turns out that they were mistaken: the Plaintiff therefore is entitled to recover the money which he has paid under a mistake. He had a right to make use of the invention without paying any thing for it. The Defendant has no right to the annuity, and indeed he has already failed in an action on the bond in which the validity of the patent was put in issue.

Sir

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Sir JAMES MANSFIELD Ch. J. (stopping *Cockell* Serjt. for the Defendant). It is not pretended that any action like the present has ever been known: In this case two persons equally innocent make a bargain about the use of a patent, the Defendant supposing himself to be in possession of a valuable patent-right, and the Plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; *non constat* what advantage he made of it; for any thing that appears he may have made considerable profit. These persons may be considered in some measure as partners in the benefit of this invention. In consideration of a certain sum of money the Defendant permits the Plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him. How then can we say that the Plaintiff ought to recover back all that he has paid? I think that there must be judgment for the Defendant.

HEATH J. There never has been a case, and there never will be, in which a Plaintiff having received benefit from a thing which has afterwards been recovered from him has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent though he has taken the fruits of the land.

ROOKE J. I am of the same opinion.

CHAMBRE J. The Plaintiff has had the enjoyment of what he stipulated for, and in this action the Court ought not to interfere, unless there be something *ex æquo et bono* which shews that the Defendant ought to refund. Here both parties have been mistaken; the Defendant has thrown

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thrown away his money in obtaining a patent for his own invention; not so the Plaintiff, for he has had the use of another person's invention for his money. In the case of *Arkwright*'s patent, which was not overturned till very near the period at which it would have expired, very large sums of money had been paid; and though something certainly was paid for the use of the machines, yet the main part was paid for the privilege of using the patent-right, but no money ever was recovered back which had been paid for the use of that patent. I am therefore of opinion that judgment of nonsuit should be entered.

Judgment of nonsuit.

BEARDMORE and Another, Assignees of a Bankrupt, *v.* SHAW and Another, Sheriff of *London*.

May 21st.

TROVER by the Plaintiffs, as assignees of a bankrupt, for goods belonging to the bankrupt taken under an execution. At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Hilary* term, the Defendants, in order to defeat the Plaintiffs' right of action, proved an act of bankruptcy long prior to that upon which the commission was founded, and also a debt of the same date sufficient to support a commission. It appeared, however, that a former commission had been sued out against the bankrupt, and had been superseded at the application of all the creditors, one of whom was the person whose debt was now relied upon by the Defendants, and that the same creditor had now proved the same debt under the commission by virtue of which the Plaintiffs were chosen assignees. Upon these facts, the Plaintiffs contended that the debt proved was not such a debt as could support a commission, for that the creditor to whom

The debt of a creditor, who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission, by a Defendant in an action at the suit of the assignees under that commission.

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whom it was owing, having joined in superseding a former commission, and having proved his debt under the existing commission, could not become petitioning creditor under a new commission; and consequently the prior act of bankruptcy proved would not avail the Defendants, inasmuch as there was no proof of any such debt as would, with that act of bankruptcy, found a new commission. His Lordship allowed a verdict to be taken for the Plaintiffs, but reserved to the Defendants the liberty of moving this Court that a nonsuit might be entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Best and *Onslow* Serjts. now shewed cause. It has been lamented that commissions can ever be overset by the objection of a prior act of bankruptcy coupled with a sufficient debt, and it has been thought that it would be better if no objection could be available on that ground till a new commission is actually sued out. The Court therefore will not give effect to the objection in this case, which is differently circumstanced from any hitherto decided, unless they feel themselves bound by law so to do. The creditor whose debt is relied on has, by joining in an application to supersede the former commission, and proving his debt under the existing commission, abandoned his right to revert back to the old act of bankruptcy, and sue out a third commission. Nor does he indicate the least intention of so doing, but the Defendants, who are mere third persons and strangers, endeavour to avail themselves of a right which he renounces. If the creditors, who are in a situation to sue out an earlier commission, agree to prove their debts under the existing commission, why should a person not in a situation by his own debt to avail himself of the prior act of bankruptcy, be allowed to say that the commission shall not be supported?

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Shepherd Serjt. *contrà*. The argument on behalf of the Plaintiffs amounts to this, that though the existing commission was invalid at the time it was sued out, and liable to be defeated by proof of a prior act of bankruptcy coupled with a sufficient debt, yet that the voluntary *ex post facto* act of the creditor in proving under this invalid commission makes it as completely valid as if no prior act of bankruptcy had been committed. One invalid act, therefore, is to be supported by another invalid act. The question is not, what has been done under this commission, but how all things stood at the time when it was sued out. This creditor, though he has proved, has never been paid his debt; and it cannot for a moment be contended, that, if the existing commission should be superseded to-morrow, all the creditors, whose debts are sufficient in amount, would not be at liberty to found a new commission on those debts which they have proved.

The Court took time to consider of this matter till the next day, when

Sir JAMES MANSFIELD Ch. J said, it is much to be lamented that the former act of bankruptcy should in this case be made a ground to supersede the present one; yet so the law is. The only question is, Whether this debt, having been proved under the present commission, affords a sufficient objection in law to the creditor taking out a new commission? Though this circumstance might be a ground of application to the Chancellor, it does not authorise this Court to interfere. We cannot say that the existing creditor, having proved his debt under the present commission, is thereby barred at law from taking out a new commission. The consequence is, that the present action cannot be supported, since the commission, upon which the Plaintiffs' title rests, is not well founded. We must consider whether the commission was well founded or not at the time when it issued; for, if not, it would

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be singular indeed that it should be made good by such a circumstance as the creditor proving under it. At the same time, it may be observed, that if this had been the only subsisting debt under the old act of bankruptcy, and this debt had been paid or released before the trial, the commission might have been supported, and so the commission might have been made good by an act subsequent to the time of its being issued, though it were bad at the time when it was taken out. But I cannot see any ground in law which authorises the Court to say that a subsisting creditor, who has proved his debt under a new commission, is thereby precluded from taking out a commission founded on an old act of bankruptcy.

Rule absolute.

May 22d.

Ex parte PRICKETT.

A *dedimus potestatem* charged in an attorney's bill is a sufficient item to enable the Court to refer the bill for taxation, though with this exception it be entirely for conveyancing.

AN application having been made for an order to tax an attorney's bill,

Cockell Serjt. now opposed the application, upon the ground that the bill did not contain any charges relating to a suit at law; and the only question was, Whether a writ of *dedimus potestatem* charged in the bill was to be considered as a sufficient commencement of a suit to warrant the Court in taxing the rest of the bill, which consisted of charges for conveyancing.

The Court was of opinion, that as it had been held that a single law article was sufficient to authorise the Court to refer a bill for taxation, the charge in this case, of a *dedimus potestatem*, which presumed a previous writ of covenant, was sufficient for that purpose; and observed, that

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that the Court of *King's Bench* had gone further, and had held that where an attorney was employed, they might refer his bill for taxation, though it contained no law articles (*a*), and accordingly made the order for taxation (*b*).

(*a*) The Court of King's Bench, in the case *Ex parte Williams*, 4 *Term Rep.* 496. held that an attorney's bill might be referred to be taxed, though all the business charged were done at the quarter sessions.

(*b*) In *Winter* v. *Payne*, 6 *Term Rep.* 645. the Court of K. B. held that these charges, viz. "taking instructions to commence an action, drawing and ingrossing affidavit of debt, attending the swearing the same, and paid for oath," were to be considered as charges for business done in the Court.

DAVIS *v.* JONES.

May 24th.

An action of covenant for not levying a fine is a personal action within the meaning of the 13 *G.* 3. *c.* 51. *s.* 1. which empowers the Judge to certify the Defendant's residence in *Wales*, if the verdict be under 10*l.*, in order that a nonsuit may be entered.

THIS was action of covenant for not levying a fine in the court of great sessions at *Carnarthen*, and was tried before Mr. Justice *Lawrence* at the spring assizes for *Hereford* 1805, as being the next adjoining *English* county to that in which the cause of action arose. At the trial the Plaintiff recovered a verdict with damages, the covenant being by the husband that his wife should levy a fine, and he not having been able to prevail upon her so to do at the time when the action was commenced; and the learned Judge certified on the back of the record under the 13 *G.* 3. *c.* 51. (*a*), that the Defendant was resi-

(*a*) The provision of the 13 *G.* 3. *c.* 51. *s.* 1. is, "in case the Plaintiff, in any action upon the case for words, action of debt, trespass on the case, assault and battery, or *other Personal action*, where the cause of such action shall arise within the dominion of *Wales*, and which shall be tried at the assizes at the nearest *English* county to that part of the said dominion of *Wales* in which the cause of action shall be laid to arise, shall not recover by verdict a debt or damages to the amount of 10*l.*," if the Judge certify the Defendant's residence in *Wales*, at the time of the service of the writ, and that fact be suggested on record, judgment of nonsuit shall be entered against the Plaintiff, and the Defendant shall recover his costs.

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dent in *Wales* at the time of the service of the writ. A rule *nisi* for entering a suggestion of the above fact on the roll having been obtained on a former day,

Williams Serjt. now shewed cause. This being an action of covenant for not levying a fine, is in the nature of a real rather than a personal action: now if it be not the latter, there are no words in the 13 *G.* 3. *c.* 51. which apply to it, and consequently the Judge's certificate will be inoperative. The words "or other personal action" used in the 1st section of the act must be construed *secundum subjectam materiam*, and may be deemed to have been introduced with a view of including all other personal actions of a like nature with those particularly specified, such as actions of escape, *&c.* By the 22 *&* 23 *Car.* 2. *c.* 9. *s.* 136. a Plaintiff who recovers less than 40*s.* in an action of "trespass, assault and battery, and *other personal actions*," is deprived of his costs unless the Judge certify; and there, though the words "other personal actions" are large enough to include every kind of personal action, yet the courts have restrained them to actions of trespass *quare clausum fregit*, and *assault and battery*. No decision has ever taken place upon the words used in the 13 *G.* 3. *c.* 51. *s.* 1.; nor does any reason appear why the same construction should not be adopted by the Court, as has been adopted with respect to the words used in the 22 *&* 23 *Car.* 2.

Vaughan Serjt. *contrà*, after referring to the preamble of 13 *G.* 3. *c.* 51. which is, "whereas to the intolerable vexation and charge of his Majesty's subjects in the dominion of *Wales* it hath been the practice to commence trifling and frivolous suits in the courts at *Westminster* upon causes of action arising within the said dominion of *Wales* in order that the same may be tried in the nearest adjoining *English* county to that part of the dominion of *Wales*

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Wales in which the cause of action has arisen, to discourage the like practice for the future, &c." He observed, that the construction of so remedial a law should be as liberal as possible, and contended that a similar construction could not be put upon the words "other personal action," used in the 13 *G. 3. c.* 51. as had been put upon the like words in 22 & 23 *Car.* 2., because there the generality of the preceding words had been controlled by what followed, confining the certificate to assault and battery, and cases where the freehold or title to land came in question, which was not the case in this statute. He was then stopped by the Court.

Sir JAMES MANSFIELD Ch. J. It seems to me that we are called upon to decide whether the words "other personal action" used in the statute are idly introduced, or whether they have some meaning annexed to them. Is it possible to entertain a doubt that they were meant to include every personal action in which a debt or damages could be recovered? The same expression in the 22 & 23 *Car.* 2. is perhaps properly construed, but in this case, uncontrolled as the words are, I can form no doubt upon the subject. It is material to attend to the provision at the end of the 1st section, which enables the Judge to secure to the Plaintiff his costs, by certifying that the "freehold or title of the land mentioned in the Plaintiff's declaration was chiefly in question, or *that such cause was proper to be tried in such* English *county*." Now the latter words of the above provision clearly extend to every species of action. The covenant upon which this action is brought is such as the Court of Chancery would not now enforce. And indeed nothing can be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into gaol, when the general principle of law is, that a married woman shall not be compelled to levy a fine. I

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cannot conceive a more proper case for a Judge's certificate under 13 *G.* 3. *c.* 51. than the present.

HEATH J. I am of the same opinion. The 13 *G.* 3. *c.* 51. is a remedial law, and I should be sorry to narrow its operation. Indeed, I rather think a larger construction of the 22 & 23 *Car.* 2. would have been more beneficial.

ROOKE J. The language of this statute is materially different from that used in the stat. of *Car.* 2., and I do not wish to see a narrow construction put upon it.

CHAMBRE J. It seems to me impossible to entertain a doubt upon this statute, the language of which is not at all analogous to that used in the stat. of *Car.* 2. There the general words "other personal action" are narrowed by the subsequent words referring to the certificate, here they are not so narrowed. It was urged that this was in the nature of a real action, as respecting land; but I think many actions of that kind better tried near the spot where the cause of action arises than elsewhere; as, for instance, actions for not repairing.

Rule absolute.

May 25th.

HODGES *v.* DRAKEFORD.

The assignment of a lease in writing without seal did not require a stamp before the 44 *G.* 3. *c.* 98.

If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

ASSUMPSIT. The declaration stated, That in consideration that the Plaintiff, at the special instance and request of the Defendant, would buy the lease of a certain shop of him, the Defendant,

the

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the Defendant undertook and promised that he was in the habit of baking 15 sacks of flour by the week on the average; that the Plaintiff, confiding in the said promise of the Defendant, did buy the lease for 500*l.* and paid for the same; nevertheless the Defendant, not regarding his promise, deceived the Plaintiff in this, to wit, that he never did bake 15 sacks of flour by the week on the average, but, on the contrary thereof, baked a much smaller quantity, to wit, 10 sacks by the week on the average, and no more. Plea, *non assumpsit.*

At the trial before Sir *James Mansfield* Ch. J. at the *Westminister* sittings after last *Hilary* term, it appeared, that the Defendant, who was a baker, had advertised his shop to be let, and the advertisement stated, that the consumption of the shop amounted to 15 sacks of flour *per* week; that the Defendant, being applied to by the Plaintiff, shewed him the premises, and said that it was a very good shop, and did business to the full extent stated in the advertisement, whereupon the Plaintiff agreed to buy the lease. It being admitted, however, by the witness who proved these facts, that an agreement in writing was made (which agreement, being unstamped, was not produced), the witness was prevented from giving any further account; but an unstamped assignment, indorsed upon the lease, was produced, which was in the following words:

"Mr. *Wm. Drakeford* to Mr. *Wm. Hodges*, } I, *William Drakeford*, do assign this lease to *William Hodges*.

(Signed) *Wm. Drakeford.*

Witness { *James Lewis*, *Wm. Sallies.*"

On this evidence his Lordship nonsuited the Plaintiff.

On a former day in this term, a rule *nisi* for setting aside the nonsuit and granting a new trial was obtained,

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and two questions were made. First, Whether, before the late stamp act (*a*), it was necessary that an assignment of a lease should be stamped? Secondly, Whether the parol evidence of the promise respecting the flour could be received.

Shepherd Serjt. contended, first, that it was necessary that the assignment should be stamped, for that it must be considered either as a contract, or as evidence of a contract. Secondly, That as the agreement between the parties, as well respecting the flour as the sale of the lease, was put in writing, it was not competent to the Plaintiff to split the agreement, and prove the sale of the lease by the assignment itself, and the agreement respecting the flour by parol.

Best Serjt. insisted, First, that the assignment of a lease was not made liable to a stamp by the words of any statute before the last stamp act, unless such an assignment were made by deed. Secondly, That as soon as the assignment was executed, the agreement for that assignment was at an end, the thing agreed upon being done; and that it was competent for the Plaintiff to prove the parol undertaking respecting the flour.

The Court was of opinion, first, that the assignment indorsed upon the lease did not require a stamp, saying, that as it was not by deed, it did not require a deed stamp, and as it did not import a contract to assign, but was itself an assignment executed, it could not be considered as an agreement; and referred to the case of *Farmer ex dem. Earl* v. *Rogers*, *Bull. N. P.* 110. Secondly, that although the agreement for the conveyance was done away by the conveyance itself, yet, as the assignment did

(*a*) 44 G. 3. *c.* 78, which sub. jects all instruments of assignment, whether by deed or not, to a stamp duty.

not

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not contain the matter upon which the Plaintiff had declared, that instrument would not maintain the declaration; and, as the agreement upon which the action was founded was put in writing, the Plaintiff could not make out his case without producing that agreement.

Rule discharged.

GANDY *v.* BORROWDALE.

May 25th.

When time to plead has been obtained, if the Defendant plead and give a rule to reply before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea.

THIS was a rule to shew cause why the rule to reply, given by the Defendant in this case, should not be discharged with costs. It appeared, that an order to amend had been obtained on the 27th of *March*, and a week's time to plead given after the amendment should be made; that the amendment was made on the 10th of *May*, and a plea filed on the 13th, though the time to plead did not expire till the 17th; but, no information of this plea being filed, was given to the Plaintiff. On the 16th, when the attorney for the Plaintiff got the plea, he took it to counsel to prepare a replication, and on the 17th, served a summons for time to reply on the Defendant's attorney, when the latter served him with a demand of replication; upon this, the Plaintiff's attorney searched the office, and found a rule to reply filed on the 13th, of which no notice had been given.

Williams Serjt. shewed cause, and insisted that, although the Defendant had obtained a week's time to plead, he was at liberty to file his plea, and give a rule to reply as soon as the plea was ready.

Onslow Serjt. *contrà* insisted, that where a Defendant, who has obtained time to plead, pleads before the expiration

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piration of that time, he ought to give notice to the Plaintiff, and cited the case of *Thomas* v. *Pritchard*, 4 *Term. Rep.* 664., in which the Court of *King's Bench* held that a prisoner could not be superseded because he did not give notice of his plea.

Sir JAMES MANSFIELD Ch J. The Defendant, by obtaining a week's time to plead, induced the Plaintiff to suppose that he did not mean to plead till the end of the week. Without giving notice of his plea, therefore, he had no right to compel the Plaintiff to take another step until the time had expired within which he was bound to plead. The officers say, that until notice of the plea has been given, there can be no rule to reply.

ROOKE J. If a rule to reply could be given before the time for pleading has expired, the rule to plead (of which the time given to plead is only an extension), and the rule to reply would be running at the same time, which the practice of the Court, according to the report of the officers, does not allow.

Per Curiam, Rule absolute.

May 25th.

If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matters, such bond requires only one stamp.

BOWEN *v.* ASHLEY.

DEBT on bond for 100*l.*, entered into by the Defendant to the Plaintiff as vice-president of a certain society called the *Bath Harmonic Society*, conditioned for the Defendant's singing and performing at certain stated times at the meetings of the said society; and the breach assigned was his non-attendance, though required at a certain meeting of the society. The Defendant pleaded *non est factum*, and then put in issue; 1st, the fact of his having

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having been required to attend; 2dly, the meeting of the society, as alleged in the declaration; and 3dly, the continuance of the society to the time of the meeting alleged in the declaration.

At the trial of this cause before Sir *James Mansfield* Ch. J. at the *Middlesex* sittings after last *Hilary* term, the bond, when produced in evidence, appeared to be a bond entered into by the Defendant and five other persons, in the form following, "We, *John Ashley*, *C. R.*, *A. C.*, *D. W.*, *J. C. D.*, and *C. T.*, of the city of *Bath*, in the county of *Somerset*, musicians, are each of us severally held and firmly bound to the Rev. *John Bowen* clerk, vice-president, &c. in the penal sum of 100*l.*, to be paid to the said *John Bowen*, or his certain attorney, executors, administrators, or assigns; for the true payment whereof we bind ourselves severally, and our several and respective, but not joint heirs, executors, and administrators, and every of them firmly by these presents, &c. &c." It then stated the terms of the engagement, and proceeded, "Now the condition of the above-written obligation is such, that if the above-bounden *John Ashley*, *C. R.*, *A. C.*, *D. W.*, *J. C. D.*, and *C. T.*, and each and every of them do and shall, at the time, and subject to the terms aforesaid, regularly and faithfully attend at the different meetings and rehearsals of the said society as aforesaid; and at such meetings perform, according to the best of their skill and ability; and also in every respect observe the rules of the said society; then the above-written obligation to be void, or else to remain in full force and virtue." This bond was duly executed by the Defendant and the five other obligors, but was written on one stamp only, in like manner as if there had been but one obligor. To the reading of this bond, therefore, the counsel for the Defendant objected, contending that it must be considered to be the several deed

of

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of each obligor, and consequently that it ought to have had six stamps. His Lordship, however, permitted the bond to be read, and the Plaintiff obtained a verdict, but liberty was reserved to the Defendant to move to have a nonsuit entered.

Accordingly, a rule *nisi* for that purpose having been obtained on a former day,

Cockell and *Williams* Serjts. now shewed cause. The stamp imposed by the different statutes, is a stamp on the peculiar instrument called a bond, without any reference to the number of obligors who may be included in that bond. The expression used in all the statutes imposing the stamp is "on any bond," without adverting to the subject of the bond or the parties. 5 *W. & M. c.* 21. *s.* 3. 9. & 10. *W.* 3. *c.* 25. *s.* 37. 12 *Ann. stat.* 2. *c.* 9. *s.* 21. 30 *Geo.* 2. *c.* 19. *s.* 1. 16 *Geo.* 3. *c.* 34. *s.* 1. 19 *Geo.* 3. *c.* 50. *s.* 16. 23 *Geo.* 3. *c.* 58. 37 *Geo.* 3. *c.* 90. *s.* 1. Now, on this bond, there is the 15*s.* stamp as for a single bond, and that is all that is necessary. The only ground upon which it can be contended that this bond ought to have more than one stamp is, that it is not a joint and several bond, but a several bond against each of the obligors. But though it be a several bond against each of the obligors, still they are all liable only to the extent of 100*l.*

Shepherd and *Bayley* Serjts. in support of the rule. This bond was entered into by the Plaintiff with the several obligors, in order to secure the performance of one contract between the Plaintiff and the several obligors. The instrument in question, therefore, is not to be deemed the single individual bond of all or any one of the obligors, but it is to operate as so many separate and distinct bonds against each of the obligors, and to subject each of them

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to a distinct penalty of 100*l.*, in case any one or all of them do not duly perform his or their engagement with the Defendant. Now, if several distinct bonds be written on one piece of paper, it would be a fraud on the revenue not to use as many stamps as there were bonds. The observation, therefore, that the stamp acts only impose the duty on the instrument, without regard to the number of obligors, has no weight in this case. The language of the deed is, that they are not jointly, but severally bound. Now, if more persons than one become severally bound, there are more bonds than one; each is severally liable to the penalty mentioned in the bond, and a separate action might be commenced upon this bond against each of the obligors; nor could another action pending on the same bond against another obligor be pleaded to such action. The words of the bond are, "Each of us are severally held and firmly bound, *&c.* in the penal sum of 100*l.*" If this instrument be only subject to one stamp, the revenue may often be defrauded in cases where bonds are to be taken of a number of persons, by including all the obligations in one instrument. In the case of *The King* v. *Reeks*, 2 *Stra.* 716. the Court held, that one stamp to one piece of parchment, on which the admissions of several corporators were entered, was not sufficient. [Sir *James Mansfield* Ch. J. That case is very different from the present, for one piece of parchment which contains the admissions of several corporators contains so many distinct admissions as there are corporators included.]

Cur. adv. vult.

On this day,

Sir JAMES MANSFIELD said: It has been argued that the several covenants of the several obligors to the bond in this case operated to render the bond the several deed of

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of each obligor, and consequently to make so many stamps necessary as there are obligors. We are of opinion that one stamp only is sufficient, and that this case cannot be distinguished from several other cases in which only one stamp would be necessary. A common instance may be given, *viz.* where a debtor compounds with his creditors, and where each creditor signs the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition. There every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed; but the whole being only one transaction, a separate stamp for each person is never required. The same principle applies to this case. This was one transaction; it was not intended that one of these musicians should be bound unless all were bound; the engagement would never have been made with one of them that he should perform by himself singly; but the binding of all of them to the same object was the consideration of the obligation entered into by each singly. We therefore think that only one stamp was necessary. It does not follow from this determination that persons may defraud the revenue by putting several bonds into one instrument, and with one stamp, as was stated in the argument. If that were to be done, and the persons who signed such bonds were severally bound, it would be a fraud. But here is no fraud.

Per Curiam, Rule discharged.

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CAWTHORNE v. HOLBEN.

May 27th.

A defeazance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney.

THIS was a rule obtained by *Vaughan* Serjt. calling upon the Plaintiff to shew cause why the judgment which had been entered by virtue of a warrant of attorney, should not be set aside for irregularity: and the only question was, whether it was necessary that the defeazance upon the warrant of attorney should be stamped.

Clayton Serjt. in shewing cause admitted that a *cognovit* upon terms must be stamped as an agreement, though a *cognovit* which is not upon terms need not, as was decided in *Ames* v. *Hill*, 2 *Bos. & Pull.* 150.; but contended that the defeazance upon a warrant of attorney is part of the warrant of attorney itself, which being liable to a particular stamp as such, the defeazance could not require any additional stamp as an agreement.

The Court was clearly of opinion that the defeazance was part of the warrant of attorney, and that an additional stamp therefore was unnecessary.

Rule discharged with Costs.

LOSEMORE v. COHEN.

May 27th.

Where the Defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the Court refused to set aside a judgment, for want of service of the notice at the Defendant's last place of abode.

THIS was an application to set aside a judgment on the ground of the Defendant not having been served with notice of the declaration. Affidavits on both sides were read, the result of which was, that at the time when

the

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the action was commenced the Defendant lived in the city of *London*, but immediately afterwards removed into a house in the county of *Middlesex;* that the Plaintiff, with a view to serve the Defendant with notice of declaration, made inquiry respecting him at the place where he had resided in the city of *London*, but found that he had quitted that house, and could learn nothing of him either from the persons at the house or from his neighbours; that when the Defendant was originally served with the writ he offered to pay the debt, if the Plaintiff would give him time; that on the 1st of *May* the Defendant himself was informed that a declaration against him was stuck up in the office; that on the 10th his attorney was informed of the same fact, and that on the 13th the judgment was signed; that the Defendant had offered to pay the costs of the judgment, if the Plaintiff would let him in to plead, but that he had since absconded.

Best Serjt. in support of the rule urged, that the Plaintiff was bound to serve a notice of declaration at the Defendant's last place of abode, if that was known (*a*).

But *the Court* held the communication made to the Defendant and his attorney of the notice of declaration being stuck up in the office, sufficient.

Rule discharged.

(*a*) *Vid. Holstein* v. *Culliford*, 1 *Bos. & Pull.* 214.

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May 27th.

THOMAS BARRS Esquire *v.* W. DIGBY, D. S. DUGDALE, C. B. ADDERLEY, and EDWARD CROXALL, Esquires, J. JOHNSON, and J. HORTON the Younger.

If a constablewick consist of several hamlets, and two collectors of the duties on houses, &c. are appointed for each hamlet, and the collector or collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors have failed is liable to a re-assessment under 20 G. 2. c. 3. and not the whole constablewick.

THIS was an action of trespass for seizing a mare and gelding, which came on to be tried at the last assizes for the county of *Warwick* before *Grose* J., when a verdict was found for the Plaintiff, damages 13*l.* 15*s.* 4½*d.*, subject to the opinion of the Court on the following case.

The first four of the Defendants are commissioners of taxes acting within the hundred of *Hemlingford* in the county of *Warwick*, and *Johnson* and *Horton*, the other two Defendants, are collectors appointed by a certain warrant under the hands and seals of the former. The warrant was to collect certain duties on houses, windows and lights, and inhabited houses, and on male servants, charged upon the inhabitants of the constablewick of *Bordesley*, within the said hundred of *Hemlingford*, by an assessment made by the said *Johnson* and *Horton*, by virtue of a warrant under the hands and seals of the said other Defendants, to raise the sum of 518*l.* 9*s.* 9*d.*, the amount of certain arrears of duties on houses, and windows and lights, and inhabited houses, for the year ending 5th *April* 1801, arising within the hamlet of *Bordesley* in the said constablewick of *Bordesley* by the failure of *William Jabet*, who collected the same within the said hamlet of *Bordesley*, and embezzled the same, and hath since become insolvent and absconded. The Defendants *Horton* and *Johnson*, on the 22d of *February* 1803, distrained a horse and mare of the Plaintiff for the sum of 13*l.* 15*s.* 4½*d.*, the proportion of the said duties charged upon the Plaintiff by the said assessment. The said *William Jabet* together

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ther with *Edward Allen*, inhabitants of the hamlet of *Bordesley* within the said constablewick of *Bordesley*, and fourteen other persons were appointed assessors and collectors of the rates and duties on houses, windows and lights, inhabited houses, and male servants, called in the said warrant the several rates and duties for the said constablewick of *Witton*, *Bordesley*, *Duddeston*, and *Nechells*, *Castle Bromwich*, *Little Bromwich*, *Erdington*, *Saltley* and *Washwood*, and *Water Ortan*, for the year ending 5th *April* 1801, by certain warrants under the hands and seals of three of the commissioners of taxes acting within the said hundred of *Hemlingford* in the said county of *Warwick*, addressed to them, and calling them inhabitants of the constablewick of *Witton*, *Bordesley*, *Duddeston* and *Nechells*, *Castle Bromwich*, *Little Bromwich*, *Erdington*, *Saltley* and *Washwood*, and *Water Ortan*, within the said hundred and county. At the foot of each of the said last-mentioned warrants the proportion of the land-tax to be raised in each of the said places called *Witton*, *Bordesley*, *Duddeston* and *Nechells*, *Castle Bromwich*, *Little Bromwich*, *Erdington*, *Saltley* and *Washwood*, and *Water Ortan*, is stated in manner following:

	£.		
Witton,	42	9	0
Bordesley,	116	14	7
Duddeston and *Nechells*,	63	13	5
Castle Bromwich,	169	15	9½
Little Bromwich,	63	13	5
Erdington,	157	15	9
Saltley and *Washwood*,	63	13	5
Water Ortan,	31	16	9½
£.	709	12	2

The parish of *Aston* mentioned in the declaration contains three constablewicks, *viz.* the constablewick of *Aston*, and the constablewick of *Bordesley*, and the constablewick

stablewiek of *Deretend.* The several places in the last-mentioned warrants called *Witton*, *Bordesley*, *Duddeston* and *Nechells*, *Castle Bromwich*, *Little Bromwich*, *Erdington*, *Saltley* and *Washwood*, and *Water Ortan*, are separate and distinct hamlets in, and altogether compose the constablewick of *Bordesley*. The 16 persons named as assessors and collectors in such last-mentioned warrants were inhabitants of and taken from each of the said hamlets, *viz.* two from each hamlet. The assessments on the inhabitants of the said several hamlets for the duties on houses, windows and lights, and inhabited houses, and on male servants, horses, and carriages for the year ending 5th *April* 1801, were made as follows, to wit, the assessment within the hamlet of *Bordesley* was made by the said *William Jabet* and *Edward Allen* only, who were inhabitants of that hamlet, and who alone signed such assessment as assessors, and who alone verified such assessment upon their oaths before the commissioners. And the several assessments within each of the said other hamlets were in like manner made and signed, and verified upon oath by the two persons only named in such warrants who were respectively inhabitants of such hamlet, and each of the said assessments is separately signed and allowed by and under the hands and seals of three of the commissioners of taxes acting within the said hundred of *Hemlingford;* and the said assessments so allowed were by such commissioners delivered to the persons named in such warrants to be collectors of the said duties as follow, (*viz.*) the assessments within the hamlet of *Bordesley* were delivered to the said *Jabet* and *Allen*, and the assessments within the said other hamlets were respectively delivered to such of the other persons named in such warrants who were respectively inhabitants of the hamlet for which each assessment so delivered was made. The duties contained in such assessments were likewise collected in each of the

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said hamlets as follows, *viz.* the said assessment within the hamlet of *Bordesley* was collected by the said *William Jabet* and *Edward Allen*, inhabitants of that hamlet, who alone signed such assessment as collectors, and the several other assessments were in like manner signed by the persons collecting the same in each hamlet, and who were inhabitants of the hamlet in which they respectively collected. The collectors of the duties within the hamlet of *Bordesley* were and are always paid for their trouble by the Receiver-General separate and independent of the other hamlets, out of the duties collected within that hamlet only. The said several hamlets were and always have been separately assessed for the land-tax by two inhabitants of each of the said hamlets, and such assessments have always been collected by two persons inhabitants of each of the said hamlets; and each of the said hamlets have been always uniformly charged in such assessment for the land-tax with the particular sum set against the name of each of the said hamlets in figures at the foot of the said last-mentioned warrants, and in the duplicates of the land-tax transmitted by the Commissioners to the Receiver-General, and into the King's Remembrancer's office. The said several hamlets have always uniformly been returned as several and distinct parishes or places, having separate and distinct assessors and collectors. And in the duplicates of the assessments of the said duties on houses, windows and lights, and inhabited houses, and on male servants, horses, and carriages, transmitted by the Commissioners to the Receiver-General, and into the King's Remembrancer's office, the said several hamlets have likewise always uniformly been returned as separate and distinct parishes, or places having separate and distinct assessors and collectors. Sixteen persons have uniformly been appointed assessors and collectors by warrants, in the form of the two last mentioned, and the persons

persons so appointed assessors and collectors have been uniformly taken from each of the said hamlets, *viz.* two from each hamlet; and all the proceedings under such warrants have been likewise uniformly the same as before mentioned. *Jabet*, one of the collectors, who collected only within the hamlet of *Bordesley*, did not pay the whole of the duties by him collected within that hamlet to the Receiver-General, being in arrear 518*l.* 9*s.* 9*d.* for the year ending 5th *April* 1801. *Jabet* had no estate or effects that might be seized under the statutes. The hamlet of *Bordesley* was returned in arrear into the Exchequer by the Receiver-General, for the several sums before mentioned for the year ending 5th *April* 1801, and a *distringas* was thereupon issued out of His Majesty's Court of Exchequer against the said *Jabet* only, as collector within that hamlet, to answer such arrears. There was no failure in any of the collectors in the other hamlets, nor were any of them in arrear. The Plaintiff resided and was assessed in the hamlet of *Witton* only. The assessment for the said hamlet of *Witton* for the year ending 5th *April* 1801 was made by *Richard Ashford* and *Joshua Short* only; their assessment was allowed under the hands and seals of three of the Commissioners, and they at the same time under their hands and seals appointed *Short* to collect the same.

The question for the opinion of the Court was, whether the hamlet of *Bordesley* was alone answerable for *Jabet's* embezzlement, or whether the whole constablewick within which that hamlet lies was not answerable.

This case was argued in *Michaelmas* term last by *Vaughan* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendants; but the argument is omitted, as it wholly turned upon the construction of the several sections of the act of parliament mentioned and commented upon in the judgment.

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The opinion of the Court was now delivered by

Sir JAMES MANSFIELD Ch. J. The question in this case is, whether the constablewick within which the hamlet of *Bordesley* lies be liable to make good the arrears of duties which ought to have been paid by the collector or the inhabitants of the hamlet of *Bordesley* only. This will depend upon the construction of the 20 *Geo.* 2. *c.* 3. The 6th section of that act directs that the commissioners of the land-tax shall be commissioners for putting that act in force, and directs that they shall divide themselves in hundreds, laiths, wapentakes, rapes, wards, towns, and other places within their limits as they shall think fit, and shall direct their precepts to such inhabitants, and such number of them, as they shall think convenient to be presenters and assessors, requiring them to appear before the commissioners. These persons are to return the names of two or more persons within the bounds of the parishes or places where they shall be assessors respectively to be collectors, for whose paying to the Receiver-General such money as they shall be charged withall, the parish or place by whom they are so employed shall be answerable, by which must be meant the parish or place for which they shall be appointed. With respect to the appointment the commissioners are directed by section 9. to nominate and appoint two of the persons named in the certificate or assessment to be collectors, or any other two such persons as they shall think able and responsible for the respective divisions and places for which they were so presented. By this section therefore the power of the commissioners is confined to the appointment of two persons for any parish or place for which persons shall be presented to be assessors. By section 34. it is enacted, that in case there shall be any arrear of rates by reason of the failure of any collector for

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for which any parish or place shall be answerable, the commissioners may re-assess the same within the said parish or place respectively, and cause the same to be raised and levied in the same manner as the rates and duties under the act are directed to be levied. The appointment made by the commissioners in the present case is something equivocal in its language, and seems to imply some doubt in the commissioners how the appointment was to be made. They appoint sixteen assessors and sixteen collectors. Though the appointment is not made for the constablewick, but for the several hamlets, yet if in point of law sixteen collectors could have been appointed for the constablewick, we might perhaps have considered it as an appointment of the whole sixteen for the constablewick. But it appears from the act to be impossible that more than two collectors should be appointed for any place. In *The King* v. *Loxdale*, 1 *Burr.* 445. and *The King* v. *Morris*, 4 *Term Rep.* 550. it was determined that no greater number than four overseers of the poor could be appointed for any place, the statute of 43 *Eliz.* having authorised the appointment of four, three, or two. The fair interpretation of the instrument is, that it was the intention of the parties appointing to do what by law they might, namely, to appoint two collectors for each place. Indeed it appears that these collectors have constantly acted as if there had been a separate appointment for each of these hamlets; payment has been made to each of the several collectors for what each of them has done in his respective hamlet; whereas if the whole number had been appointed for one place, there would have been sixteen collectors instead of two to be paid for one place. These being the facts, which all correspond with the only sense which can be given to the appointment consistently with the act, the result is, that the hamlet of *Bordesley* must be considered

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as a distinct parish or place within the meaning of the act, and consequently the commissioners had no authority to distrain on the Plaintiff for the deficiency of the hamlet of *Bordesley*. This is indeed an unfortunate construction for the hamlet of *Bordesley*; but considering the act of parliament, and the nature of the appointment, it does not appear to us that any other construction can be put upon the act of the commissioners. The consequence is, judgment must be given for the Plaintiff.

Judgment for the Plaintiff.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND IN THE

HOUSE OF LORDS,

IN

Trinity Term,

In the Forty-fifth Year of the Reign of GEORGE III.

MEEKE *v.* OXLADE and Others.

June 18th.

In an action against 46 Defendants, where the declaration contained two counts for work done by Plaintiff as an attorney, and two more for work done by him, without saying in what capacity, the Court ordered two counts to be struck out, and the word "Defendants" to be substituted for the names of the Defendants in all the places where they occurred except the first.

THIS was an action for work and labour against 46 Defendants for journeys and attendances respecting an inclosure act. The declaration contained four counts, in two of which the Plaintiff declared as an attorney, and in two others not so.

Best Serjt, moved to strike out two counts, and substitute the word "Defendants" for the names of the Defendants in all those places where their names occurred, except the first.

Bayley Serjt. *contrà.*

The Court made the rule absolute.

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June 18th.

GIBSON *v.* WELLS.

An action on the case does not lie for permissive waste.

THIS was an action on the case in the nature of waste. The first count stated, that the Defendant on the 1st *March* 1803, and from thence continually hitherto held and enjoyed, for a certain term not yet determined, a messuage of the Plaintiff; that the Plaintiff was seised in fee thereof, and that the Defendant, well knowing the premises, broke down divers perches of a certain wall of the said messuage, and kept the same broken down, *&c.* by reason whereof the Plaintiff's reversionary interest was injured. The second count stated, that the Defendant, on the 1st *March* 1803, and from thence continually, held and enjoyed one other messuage of the Plaintiff upon, among others, the condition following; that the Defendant should not, during the said tenancy, suffer the said messuage to be out of tenantable repair for want of the necessary repairing; that the Plaintiff was seised in fee, yet that the Defendant, contriving to prejudice him in his reversionary interest, suffered the said messuage to be out of tenantable repair, for want of the necessary repairing thereof in the roofing, walls, windows, *&c.* whereby the Plaintiff's reversionary interest was injured. The third count stated the Defendant to hold on the following condition, that the Defendant should not, during the said tenancy, wilfully suffer the said messuage to be out of tenantable repair, for want of such repair as tenant from year to year ordinarily ought to do. The fourth was upon the following condition, that the Defendant should not, during the said tenancy, suffer the said messuage to be out of repair for want of proper tiling in the roof, or of proper glass in the windows. And the last upon the following condition, that the Defendant should not nor would wilfully misuse the said premises, or neglect any repairs

repairs he ought to do thereto, so as to prejudice the Plaintiff's reversionary interest. Breaches were assigned in the three last counts upon the respective conditions in the same manner as in the second count. The Defendant pleaded not guilty.

At the trial before Sir *James Mansfield* Ch. J. at the *Westminster* sittings after last *Easter* term, it was proved, that the Defendant had occupied the house in question for a considerable time as tenant at will to the Plaintiff, who was seised in fee thereof, and that the house was much out of repair. But his Lordship, being of opinion that the dilapidations proved amounted only to permissive waste, nonsuited the Plaintiff, saying, that although an action on the case in the nature of waste might be maintained for commissive waste, yet that he had never known an instance of such an action being maintained for permissive waste only.

Bayley Serjt. moved for a rule to shew cause why the nonsuit should not be set aside and a new trial be granted, and urged that, as there was no doubt that an action on the case might be maintained for acts of commission, there was no reason why such an action should not be maintainable for neglect amounting to waste at law; that the foundation of the action was, that an injury was done to the reversion by the default of the tenant, and the reversion was equally injured whether the dilapidations were occasioned by commission or neglect.

Sir JAMES MANSFIELD Ch. J. There is no doubt but an action on the case may be maintained for wilful waste; but at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will who omitted to repair a broken

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broken window. I think this action is an innovation, and I am not disposed to encourage it.

The other Judges concurring,

Bayley Serjt. took nothing by his motion.

On a subsequent day, *Bayley* mentioned this case again, and referred the Court to several precedents of counts in declarations for permissive waste similar to those in the present case; but it appearing that they had been joined with counts for waste wilfully committed, and that on the point now in question no express decision could be produced,

The Court adhered to their former opinion, and refused a rule to shew cause.

June 18th.

TESSEYMAN *v.* GILDART.

If insufficient pledges *de retorno habendo* be taken by the officer of the Court below in replevin, the remedy against him is by action, and this Court will not order him to pay the costs recovered by the Defendant in replevin.

WILLIAMS Serjt. moved for a rule to shew cause why the steward or chief bailiff of the Court of *St. Peter's* at *York* should not pay the costs recovered by the Defendant in replevin, on account of the insufficiency of the pledges taken by him *de retorno habendo*, and he cited *Richards* v. *Acton*, 2 *Black.* 1220.

But *The Court* refused the rule, saying, that the Defendant's remedy was by action, there having been no cause in Court at the time when the replevin bond was taken.

Williams took nothing by his motion.

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FENN, on the Demise of BUCKLE, *v.* ROE.

June 20th.

Service of a declaration in ejectment by nailing it on the barn door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house, and the tenant not being to be found at his last place of abode, was allowed to be good service.

WILLIAMS Serjt. moved for a rule to shew cause why service of the declaration in this case, by nailing it on the barn door of the premises sought to be recovered (there being no dwelling-house upon the premises, and in which barn the tenant had occasionally slept), should not be deemed good service. The affidavit, upon which the motion was founded, stated that the tenant was not to be found at his last place of abode, and that no person belonging to him was to be found upon the premises.

The Court hesitated much whether this motion could be attended to, but at length deemed it reasonable and granted it, adding to the motion, and why service of this rule, in like manner as the declaration had been served, should not be deemed good service unless the tenant himself could be found.

BARRY *v.* ROBINSON, Administrator of ROBINSON.

June 20th.

Debt does not lie against an administrator upon a simple contract of his intestate.

DEBT on a promissory note given by the Defendant's intestate to the Plaintiff for value received in goods. The declaration was in the *detinet* only, and contained a count for goods sold and delivered. To this declaration the Defendant demurred generally, and the Plaintiff joined in demurrer.

Onslow Serjt. in support of the demurrer. The ground upon which this declaration has been demurred to is, that an action of debt in simple contract will not lie against an administrator. The point is settled by a series of authorities

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rities from the earliest times. In *Pinchon's* case, 9 *Rep.* 87. *b.* the law was admitted to be so; and in *Hodges* v. *Jane*, *Sty.* 199. *Roll* Ch. J. expressly lays it down, that an action of debt lies not against an executor upon a simple contract made by the testator; and he assigns a reason for the wager in law, *viz.* because it is intended that as well the contract to pay money may be in private, as also the payment may be made in private. The same rule of law was acted upon in *Hampton* v. *Bowyer*, *Cro. Eliz.* 557. and *Bowyer* v. *Garland*, *Cro. Eliz.* 600.; and is also recognized in *Plowd.* 182. and *Vaughan*, 97 to 100. In *Snelling* v. *Norton*, *Cro. Eliz.* 409. the custom of *London*, by which an executor is liable in debt on simple contract, was admitted to be valid, but the rule of law as applicable to all executors not affected by the customs of *London* was recognized both in that report and in 5 *Rep.* 82. *b.* and 8 *Rep.* 126. So in *Gunn* v. *Mackhenry*, 1 *Wils.* 277. the Court said, if the Plaintiff had declared here in debt on a *concessit solvere*, the Defendant might have waged his law. It is clear therefore, that debt upon simple contract cannot be maintained against the personal representatives of a deceased contractor.

Marshall Serjt. *contrà*. The objection is, that debt will not lie against an executor on simple contract, because he cannot wage his law. The ancient idea was, that no action, of any sort, would lie against an executor where the testator in his lifetime might have waged his law; and the reason given is, that the executor would be deprived of a defence, namely, wager of law, which the testator might have had. But the objection could only be made by plea or demurrer, and therefore, where an executor was sued and declared against in court, (as was the ancient practice,) upon a simple contract of his testator, the Judge asked his attorney whether he had a mind to avoid the suit. The attorney answered yes. The

Judge

Judge then told the Plaintiff he could take nothing by the writ. 10 *H.* 6. 24. *b.* 25. *a.* cited by *Vaughan* Ch. J. *Vaughan*, *p.* 97. An action was brought against an executor upon a tally struck by the testator: the Judges said, *Nil capiat per breve*, if he have no better specialty. 25 *Ed.* 3. 40. cited by *Vaughan* Ch. J. *p.* 100. who thinks this may have been determined upon demurrer. It seems manifest from all the old books, that if a party to a simple contract died before performance, the remedy was gone; and, indeed, the right in such case seems to have been considered as *actio personalis quæ moritur cum personâ*. Before the time of *Q. Eliz.* the action of *assumpsit* was never thought of. Debt was the only action which would lie upon a simple contract. Throughout the year-books the action of *assumpsit* is never mentioned. *Slade's* case 4 *Co.* 92. *b.* was the first that sanctioned this form of action by legal authority. This was after a long struggle. The Judges of *B. R.* were in its favour; those of *C. B.* against it. *Geo. Kemp*, Esq., one of the officers of *B. R.*, was employed to search for precedents of such actions; and he of course found many; but not one where the legality of this form of action was ever questioned; and none were found earlier than *Hen.* 6th. Lord Ch. J. *Vaughan*, speaking of *Slade's* case in his *Reports*, *p.* 101. says, "though, since that illegal resolution of *Slade's* case, grounded upon reasons not fit for a declamation, much less for a decision of law, the natural and genuine action of debt upon simple contract be turned into an action on the case, *&c.* Actions on the case are all *actiones injuriarum et contrà pacem*, and it is not a debt certain, in reason of law, that can be recovered in these actions, but damages for the injury ensuing upon the breach of promise," *&c.* Mr. Justice *Blackstone*, in *Mast* v. *Goodson*, 2 *Bl.* 850. speaking of the action of *assumpsit*, says, "Originally all actions on the case were for torts, till the introduction of *assumpsits* on *mutuatus* and

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and other debts in the time of *Q. Eliz.* (*Slade's* case) in order to give the Court of *King's Bench* an original jurisdiction in actions of debt, wherein (as in cases of detinue, covenant, and account,) no original is by law returnable out of Chancery. Since that introduction, we must distinguish whether the particular action before the court be founded on tort or on contract. If the former, it may be joined with any tort; if the latter, with any contract." At length the question arose in *Pinchon's* case, 9 *Rep.* 86. *b.* whether *assumpsit* would lie against an executor. The reasons urged against this action are, "Because it is a maxim in law that executors shall not be charged with a simple contract; and that for two reasons; 1st, because, by the presumption of law they cannot have knowledge either of the beginning of the debt, being made by word, without writing, or of the continuance of it, because the testator might pay it privately: 2dly, because if an action on the case should lie against an executor, it would impugn the said maxim of the common law; for every contract executory implies an *assumpsit* in law, and by consequence an executor would be charged with every contract executory, which would be directly against the maxim. The answer on the part of the Plaintiff was, "that a man should never have an action against executors where the testator in his lifetime might have waged his law; and the reason is, because the executor shall be deprived of the benefit of waging his law, if an action will lie against him; which reason strongly proveth, that in the case at bar the action will lie against the executors, because the testator, in an action on *assumpsit*, could not wage his law; and therefore his executor shall not be deprived of it." At length it was determined, 1st, that the testator could not wage his law: 2d, that after the death of the debtor, the debt remains; and it would be a defect in the law, if no remedy should be provided for it. Thus a form of action unknown to the ancient law, is used for the

the purpose of evading the maxim of law by equivocation; and it is now said, that the ancient proper form of action shall not be used, because it would be against the same maxim. But the wager of law has long since fallen into disuse; and if a man were now to tender his wager of law, the Court would refuse to allow it, and would put him to plead to the action. [This was denied by the *Court*.] Therefore the action of debt upon simple contract will now lie against an executor without any violence to the maxim, because it cannot now be said that the testator in his lifetime might have waged his law. At all events, since by the custom of *London* a Defendant cannot, in debt on simple contract, wage his law, (*Gunn* v. *Mackhenry*, 1 *Wils.* 277.) this action will lie in *London* against an executor upon a contract made with his testator. Now here the action is brought in *London*, the parties live there, and the venue is laid there. Therefore the objection, even if good in another case, will not hold in this.

Sir JAMES MANSFIELD Ch. J. The distinction between the actions of debt and *assumpsit*, as applicable to the case of executors, is not founded in good sense; but still that distinction has always been recognized in the law. Ill-founded as it is, we must nevertheless act upon it while it continues to be law, for it is not in our power to alter the law.

HEATH J. I am of the same opinion. In old times very little inconvenience could ensue to any one from this rule, for the ordinary took the goods of the deceased and paid his debts; and for the debts due to the deceased took bonds and put them in suit.

ROOKE and CHAMBRE Justices concurring,

Judgment for Defendant.

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HILL *v.* TEBB.

The *teste* of a writ of error need not be on a seal day.

A writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term

THIS was an application to set aside the proceedings under an execution issued notwithstanding the allowance of a writ of error.

Shepherd Serjt. shewed cause, and objected, 1st, that the writ of error was of no avail, being *teste'd* on a day which was not a seal day; and 2dly, that it was returnable before the judgment was signed, the judgment having been signed on the 18th of this month, and the writ of error being returnable on the 16th. He insisted, that the writ of error was spent and inoperative before the judgment upon which it was intended to operate was signed, and cited *Gould* v. *Coulthurst*, 1 *Str.* 139. *Rejindoz* v. *Randolph*, 2 *Str.* 834. *Vice* v. *Burton*, 2 *Str.* 891. *Wilson* v. *Ingolsby*, 2 *Ld. Raym.* 1179. *Canning* v. *Wright*, 2 *Ld. Raym.* 1531. and *Jaques* v. *Nixon*, 1 *Term Rep.* 279.

Bayley Serjt. *contrà* observed, with respect to the *teste* of the writ of error, that it made no difference whether it appeared to be on a seal day or not, inasmuch as the Chancellor had power to seal writs on any day at a private seal; though judicial writs issuing out of the courts of common law can only bear *teste* as of those days on which the courts of common law sit to do business. 2dly, Admitting the authority of the cases cited, he urged that the present was essentially distinguishable from them, because in those cases the judgments and the writs of error were of different terms, whereas here the judgment, though signed on the 18th of this month, related back when signed to the first day of the term, which was antecedent to the 16th, the day on which the writ of error

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error was returnable, which distinction was expressly recognized and acted upon in the case of *Somerville* v. *White*, 5 *East*, 145.

The Court said, the case of *Somerville* v. *White* was precisely in point to prove, that the judgment in this case, though signed on the 18th of the month, related back when signed to the 14th, which was the first day of term, and consequently was prior in date to the time at which the writ of error was returnable. They also recognized the distinction taken with respect to the *teste* of a writ issuing out of Chancery, and the *teste* of a writ issuing out of a court of common law.

Rule absolute.

ARMSTRONG, Administratrix of ARMSTRONG *v.* SMITH.

June 26th.

THIS action was brought by the Plaintiff as administratrix of her husband, who had been a mate of a *West Indiaman* and had died on the voyage home, for wages due to him from the Defendant as captain of the ship upon that voyage.

Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money as the wages due to a deceased seaman, and paid the same to *Greenwich* Hospital under the 37 *Geo.* 3. *c.* 73. the representatives of such seaman may still sue the captain for any wages due beyond the sum so paid.

Upon the trial of this cause before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Easter* term, it was proved by acknowledgments of the Defendant made to the Plaintiff immediately after his arrival from the voyage, in which the Plaintiff's husband died, that 25*l.* was due to him for wages; and the only defence relied upon was, that the Defendant had within three months after the arrival of the ship paid into the office of the receiver of the sixpenny duty for *Greenwich* hospital, under

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the 37 *G.* 3.(*a*), *c.* 73. *s.* 7. the sum of 9*l.*, as the arrear of wages due to the deceased, and for the use of his executor or administrator. This, it was contended, deprived the Plaintiff of her right of action for the wages due to her husband, the Defendant having, according to the directions of the 37 *G.* 3. *c.* 73. accounted with *Greenwich* hospital, upon oath, for the amount of the wages due to the Plaintiff, and having made himself liable to heavy penalties (*b*) if he had rendered a false account. His Lordship directed the jury to deduct the 9*l.* paid into *Greenwich* hospital to the account of the Plaintiff, and give her a verdict for 14*l.* This was accordingly done, and liberty was reserved to the Defendant to move the Court to set that verdict aside, and enter a nonsuit.

A rule *nisi* having been obtained for this purpose on a former day,

Shepherd Serjt. now shewed cause. Previous to the passing of the 37 *G.* 3. *c.* 73. no doubt the representative of a deceased seaman would have been entitled to sue for such wages as were fairly due to him: and if the construction of that act insisted upon by the Defendant in this case be adopted by the Court, certainly it would have been better for the seaman, for whose benefit the

(*a*) The fifth section of that act requires masters of ships employed in the colony trade, within 10 days after their arrival out and home, to deliver upon oath to the collector or comptroller of the port where they arrive, an account of every seaman who has died during the voyage, and of the wages due to him. The seventh section enacts, that all and every sum and sums of money, which shall be due for wages to any seaman on board any ship employed in the colony trade, who shall have died during the voyage, shall within three calendar months after the arrival of such ship in *Great Britain*, be paid to the receiver of the 6*d.* duty for *Greenwich* Hospital, to the use of the executor or administrator of such seaman, under penalty of 50*l.* and double the wages due.

(*b*) By *sect.* 9. of the act, the penalties are distributed thus: *viz.* one-third to *Greenwich* Hospital, one-third to the support of the seamen's hospital at the port where the ship arrives, if there be any hospital, if not, to the old and disabled seamen of that port and their families, and the remaining one-third to the person informing and suing.

act

act was conceived, that such a law should never have passed. It appears plainly from the 5th section of the act, that it was thought an object to the seaman's representatives that the captain should immediately upon his arrival render an account of all wages due to the deceased seaman, and before he sailed again upon a new voyage pay the amount of such wages to the use of the representatives of the seaman. The reason of this provision is, that by the captain's sailing upon a new voyage the representatives of the seaman may be put to great difficulty in recovering what is due to them. But though the act directs the captain to render an account, and pay the money to *Greenwich* hospital, it does not deprive the representative of the power of suing for what is due to him beyond the sum paid into the hospital by the captain. If it be said that the captain ought not to be called upon to pay the wages into *Greenwich* hospital, and yet be liable to an action, the answer is, that he will only be liable to an action in cases where he pays into *Greenwich* hospital less than is really due to the deceased seaman. *Greenwich* hospital is made the agent of the representatives of deceased seamen to receive wages due to them, and they will be bound by the receipt of their agent as far as it goes; but ought not to be precluded from suing for wages due to them, and not paid to their agent.

Onslow Serjt. in support of the rule. Attending both to the letter and policy of the 37 *G.* 3. *c.* 73. it is evident that the present action cannot be sustained after the payment made to *Greenwich* hospital. It has been contended, that great hardship would be imposed on the seaman if the construction of the act insisted upon for the Defendant were to be adopted; and it has been attempted to invalidate the effect of the account rendered by the captain upon oath: but it should be remembered, that the captain, though liable himself to the seaman for

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wages, has nevertheless his remedy over against the owners of the ship for what he advances upon that account. His account upon oath therefore must be deemed to be the account of a disinterested person. The object of the act was not only to protect the seaman, but to protect the captain also; and the benefit conferred on the former in lieu of the right of action formerly existing in his representatives, is the obligation imposed upon the captain to render an account within three months, or make himself liable to the penalties of the act. The officer of *Greenwich* hospital is, by the act of parliament, constituted the agent of the deceased sailor; he becomes therefore his agent to all intents and purposes; and if any action is to be commenced on behalf of the representatives of the sailor, it must be commenced by the officer of *Greenwich* hospital on account of the wages not duly accounted for to him, and by him only.

Sir JAMES MANSFIELD Ch. J. The single question in this case is, Whether the 37 *G. 3. c. 73.* has taken away from the representatives of seaman dying upon a voyage the right of recovering from the captain such wages as remain due to them in their representative character, after allowing to the captain for so much as he has duly paid upon their account to the officer of *Greenwich* hospital? Nothing is to be collected from the language of the act as to the particular grievance which induced the passing those provisions which apply to this case. On that point we are left in the dark. Representatives of deceased seamen must often not only be very ignorant respecting the amount of wages due to them from captains, but must have encountered great difficulties in pursuing their remedies against captains who had probably embarked on fresh voyages. To remedy this inconvenience it is provided by the act, that every master of a ship employed in the *West-India* trade shall, within 10 days after

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after his arrival out and home, deliver in an account on oath of all seamen who have died on the voyage, and within three months after his arrival in any port of *Great Britain* pay to the receiver of the sixpenny duty for *Greenwich* hospital any wages due to any seaman who has died during the voyage, to the use of the representatives of such seaman. It is observable, that in case the master neglects to comply with the directions of the act in the abovementioned respects, he is subjected to two penalties of 50*l.* each, and also to double the amount of the wages due to the deceased seaman; but that the penalties, when recovered, are distributed in the proportions of 1-3d to *Greenwich* hospital, 1-3d to the support of the seamen's hospital, if any there be; and if not, to the disabled seamen of that port and their families; and the remaining 1-3d to the informer. Of these penalties therefore nothing is reserved for the representatives of the deceased seaman, who have been the actual losers by this neglect or fraud of the master of the ship. That is a strong ground for inferring, that it was not the intention of the Legislature to deprive them of their remedy at law for the wages not actually paid to the officer of *Greenwich* hospital. For it seems probable that the Legislature would have given some part of the penalties recovered to the representatives of the deceased seaman by way of compensation for their loss if it had intended to deprive them of their right of action for the wages not duly paid in on their account. If the whole of the wages due are faithfully paid in, of course the representative of the seaman has no longer any right of action for wages; but if a part only be paid in, and the remainder be fraudulently withheld, on what principle is it that the representatives of the seaman are to be deemed to be deprived of their right of suing for such wages? According to the construction contended for on behalf of the Defendant, the master of a ship may be called upon to pay large penal-

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ties, no part of which nor of the wages remaining unpaid will ever belong to the person really injured by the misconduct of the captain, *viz.* the representative of the seaman. It appears to me monstrous to put such a construction upon an act, which does not contain one single word by which the right of the representative to recover wages not duly accounted for to *Greenwich* hospital is taken away.

HEATH J. I am of the same opinion. Judges have always construed acts of parliament according to the plain principles of justice and equity, where such construction has not been precluded by express words. Now, in this case, we are called upon to deprive the representatives of the seaman, dying during the voyage, of his remedy at law for wages not paid into *Greenwich* hospital, in a case where no other remedy or compensation to them is substituted. If the captain neglects or evades the provisions of the act, *Greenwich* hospital is interested in pursuing him through the medium of an informer, and recovering penalties; but such suit and recovery will not benefit the representatives of the seaman.

ROOKE J. At common law, the representatives of deceased seamen had a right to commence actions for such wages as were owing to the persons whom they represented. That right, therefore, cannot be taken away from them but by the express words of an act of parliament. In the *37 G. 3. c. 73.* there are no such express words, and the observations which have been made on the distribution of the penalties are very strong to shew that it was not the intention of the Legislature to take away that right. It is in the power of the captain, by rendering a false account to *Greenwich* hospital, and also to his own owners, to obtain an advantage to himself; his account, therefore, cannot be deemed the account of a disinterested person.

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It is true this construction of the act may cause some vexation to those captains, who, having duly accounted to *Greenwich* hospital, are nevertheless sued by the administrators of the deceased seamen with a certainty of losing their costs; but such an inadvertence of the Legislature cannot alter our construction of the act.

CHAMBRE J. This appears to me a very plain case. By the contract for wages and the service performed, a debt has accrued to the representative of the deceased seaman. Of that debt he ought not to be deprived, unless by the express words of an act of parliament, or a necessary inference arising therefrom. In the *37 Geo. 3. c. 73* there are no such express words nor does any necessary inference arise to deprive the Plaintiff of her right of action. Indeed, if the construction contended for by the Defendant could prevail, it would be much better for the sailors that such an act had never passed. Administrators must often be a long time before they hear of the death of the party in whose right they are entitled. Now if the captain could protect himself from all further suit, by accounting for the wages due to *Greenwich* hospital, he would thereby exchange his liability to the administrators, which lasts six years, for a liability to a penal action, which endures for a much more limited period. The right to sue, not being taken away by the express provisions of *37 Geo. 3. c. 73.*, remains in the representatives of the deceased seaman, notwithstanding a partial account has been rendered to *Greenwich* hospital.

Rule discharged.

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June 26th.

DOE, on the Demise of the Master, Wardens, and Commonalty of the Cutlers' Company, *v.* JOHN HOGG.

If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation seal, it is a sufficient compliance with the words of the Lord's act, which require it to be signed with the name or mark of the Plaintiff.

THE Defendant in this case, having been brought up under the 37 *Geo.* 3. *c.* 85. to be discharged as an insolvent, and having complied with the provisions of the act by delivering in a schedule and making an assignment, was further detained on the Plaintiff's giving him a note to secure the weekly allowance of 6*d. per* day.

To this note,

Onslow Serjt. objected without success before *Chambre* J. the only Judge present when it was given, and now renewed his objection in full Court, insisting that it was not signed according to the directions of *sect.* 3. of the act. The note was signed by the master of the company (which it was admitted amounted to nothing), and had also the corporation seal affixed to it. He insisted that the sealing by the corporation did not fall within the words of the act, which are, "shall agree by writing, signed with his, her, or their name or names, mark or marks (*a*)," for that the seal clearly was not a name, and that the words "mark or marks" only applied to those cases in which illiterate persons subscribed the agreement; he admitted that this was a mere *casus omissus* in the act, but argued that if it were so the Court would give the Defendant the benefit of that oversight. He cited *The King* on the prosecution of *Moore* and *Wife* and ——— and *Wife* v. *Wilkinson*, 7 *Term Rep.* 156. and *Lepine* and two others, executors of *Lepine* v. *Bayley*, 8 *Term Rep.* 325., in both which cases the Court of King's Bench had held

(*a*) These words occur in 32 *Geo.* 2. *c.* 28., and are adopted by reference only into the 37 *G.* 3. *c.* 85.

that

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that a note not signed by all the persons, Plaintiffs in the suit in which the Defendant was in custody, was not sufficient.

But *The Court* observed, that a corporation could only bind itself by its corporate seal, and that as the seal of the corporation was affixed to the note in question, that was a sufficient compliance with those words of the act by which the note was required.

RAWLINS *v.* PERRY.

June 26th.

The Court will not allow the Plaintiff to take out execution pending a writ of error, merely because the Defendant's attorney has declared that the debt would be settled, and that time was all that the Defendant wanted.

THIS was an application to set aside all proceedings under an execution issued after the allowance of a writ of error. The only question was, whether the Defendant's attorney had not admitted the writ of error to be merely for delay; Accordingly, the affidavit in answer to the rule stated, that at the taxation of costs the Defendant's attorney told the Plaintiff's attorney that a friend of the Defendant would settle the cause by some means or other, and proposed that 10*l.* should be paid down in part of the debt and costs, and the balance should be paid by instalments, adding, that "time was all the Defendant wanted, and that he would send the Plaintiff's attorney a letter, informing him how much time he wanted."

On this conversation,

Bayley Serjt. in shewing cause relied, and insisted, that the language of the Defendant's attorney was an implied admission that the writ of error was brought merely to gain time, and though not expressly so stated by the Defendant's attorney, yet, if the unavoidable inference from his words was such, the Court would in this case, as in *Miller*

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Miller v. *Cousins*, 2 *Bos. & Pull.* 329., refuse to set aside the proceedings. He observed, that the admission in *Miller* v. *Cousins* was not stronger or more direct than in this case.

But *The Court* said, the rule had always been, that the admission on the part of the Defendant that the writ of error was brought merely for delay must be either express or implied; that the admission in this case certainly was not express, and that it was not necessarily to be implied from the language of the Defendant's attorney, that he brought the writ of error merely for delay, since if he had only applied for time to pay the debt, he certainly would not have deprived himself of the advantage of his writ of error as a stay of proceedings by such an application and that the language used in this case could not have a greater effect against the party using it than a direct application for time.

Rule absolute.

Best Serjt. in support of the application.

June 29th.

JENNY *ex dim.* PRESTON and Others *v.* CUTTS.

The Court held service of the declaration in ejectment on the wife of the tenant in possession sufficient, provided it could be shewn that the wife lived with her husband.

BAYLEY Serjt. moved for judgment against the casual ejector upon an affidavit which stated that the declaration was served upon the Defendant's wife, and that she had admitted that the Defendant had received the declaration.

The Court said that he might take the rule, provided a supplemental affidavit was produced that the wife lived with the husband, but not otherwise (*a*).

(*a*) See *Goodtitle, ex dim. Read*, v. *Badtitle*, 1 *Bos. & Pull.* 384.

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WILLIAMS *v.* STRAHAN. *June* 29th.

If a Defendant accept a declaration, and act as if an appearance has been entered for him, the Court will not afterwards permit him to set aside a judgment for want of an appearance having been entered.

BEST Serjt. having obtained a rule to shew cause why judgment signed by the Plaintiff should not be set aside, no appearance having been entered for the Defendant,

Shepherd Serjt. shewed cause and contended that the Defendant had by his conduct waved the want of appearance by accepting a declaration and acting as if an appearance had been entered; that his conduct amounted to an undertaking to appear, and as the Court would have compelled him to enter an appearance, they would not now suffer him to insist on the want of it as an irregularity.

Best Serjt. *contrà* insisted that the signing the judgment was the first irregularity of which the Defendant had to complain, and that as he had done no act since the judgment, he could not be considered as having waved it.

But *the Court* thought that as he had acted as if an appearance had been entered, he should not now be allowed to insist upon the want of it, there being no irregularity which might not be waved.

Per Curiam, Rule discharged.

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June 29th.

CLARKE and Another, Assignees, *v.* REED.

It is no answer to an application to change the venue from *London* to *Essex* on the usual affidavit in an action commenced by assignees, that the commission was issued and the bankruptcy declared in *Middlesex*, and the assignees chosen in *London*. But in such case, the Plaintiffs can only retain their venue by undertaking to give material evidence where it is laid.

THIS was an action for money had and received, brought by the Plaintiffs as assignees of a bankrupt. A rule having been obtained by *Shepherd* Serjt. calling on the Plaintiffs to shew cause why the venue should not be changed from *London* to *Eesex* upon the usual affidavit,

Clayton Serjt. shewed cause on an affidavit stating that the commission was issued at *Westminster*, and the bankruptcy declared there, and that several meetings under the commission, and the choice of assignees, had taken place at *Guildhall*: he insisted that it appeared from this affidavit that the whole cause of action did not arise in *Essex*, and that the Plaintiff was therefore entitled to retain his action in *London* without entering into any undertaking, and cited *Calland* v. *Champion*, 7 *Term Rep.* 205.

Sir JAMES MANSFIELD Ch. J. If the cause of action arise in two different counties, the Defendant has no right to change the venue, but the matters stated in the Plaintiff's affidavit are no part of the cause of action which must have arisen before the bankruptcy, though they are material evidence to be given in support of it. The Plaintiffs must therefore undertake to give material evidence in *London*.

HEATH J. The cause of action and the right to bring the action are two different things. A cause of action may arise in the life of a testator; the right to bring the action by the executors must accrue after the testator's death.

Per Curiam, Rule discharged upon the Plaintiff's undertaking to give material evidence in *London*.

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June 29th.

HILL *v.* TEBB.

If an execution be set aside with costs, as having been sued out after the allowance of a writ of error, the Court will not permit the costs of the application to be set off against the costs of the action, but will compel the Plaintiff to pay them forthwith.

THE Plaintiff in this case having sued out execution against the Defendant, who was an uncertificated bankrupt, notwithstanding the allowance of a writ of error, the execution was set aside as irregular with costs amounting to seven pounds, whereupon the Plaintiff obtained a rule to shew cause why those costs should not be set off against the costs recovered in the action.

Bayley Serjt. shewed cause and insisted that as the action was suspended by the writ of error, the Defendant was entitled to levy the costs of the motion.

Shepherd Serjt. *contrà* observed that the costs of the motion being entirely within the discretion of the Court, the Court would hardly think proper to grant an attachment for the seven pounds when the Plaintiff was in possession of the judgment. He offered to pay the costs into the hands of the prothonotary until the writ of error should be determined.

Sir JAMES MANSFIELD Ch. J. It would be affording great encouragement to executions of this sort if we did not compel the Plaintiffs to pay the costs immediately. Where a Defendant, as in this case, is poor, no attorney would be employed for him, unless he had a chance of getting his costs, and he could get them in no other way than by levying them immediately. I think that the Plaintiff must pay these costs, and as he has made an experiment contrary to the practice of the Court, this rule must be discharged with costs.

Per Curiam, Rule discharged with Costs.

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July 1st.

STEAD *v.* IZARD,

Where the estate of a married woman has been regularly sold with the consent of her husband, the conveyance executed by him, and the purchase-money paid, the Court of Common Pleas will not prevent the wife from levying a fine because her husband has since become *non compos*.

BAYLEY Serjt. mentioned to the Court, that the officers had some difficulty in allowing a fine to pass in favour of the conusee, the conusor of the fine being a *feme covert*, and her husband in a state of mental incapacity. He produced an affidavit of the conusee, stating that in 1786 he purchased one undivided 1-4th part of an estate, which had belonged to his father and Mrs. *Izard*, (the conusor of the fine) jointly, and that Mrs. *Izard* and her husband duly executed indentures of lease and release to him, and were paid the purchase-money; that at the time of such execution Mr. and Mrs. *Izard* resided at *Charlestown* in *America*, and had at that time no intention of returning to *England*; that Mrs. *Izard* was on that account examined before one of the Judges of the Court of Common Pleas at *Charlestown*, in order to pass a fine; that the receipt for the purchase-money was indorsed on the deeds of lease and release; that the conusee had been in the receipt of that part of the estate (together with the residue which belonged to him) ever since the execution of the lease and release by Mr. and Mrs. *Izard*; that Mr. and Mrs. *Izard* were now residing in this country, and the latter was willing to complete the title of the conusee by levying a fine in his favour, and that at the time of the purchase of the estate in question Mr. *Izard* was of perfectly sound understanding, though now incapable of managing his own affairs. He also referred to *Compton* v. *Collinson*, 1 *H. Bl.* 334. to shew that a *feme covert* was competent to levy a fine of what belonged to her; and *Moreau's* case, 2 *Bl.* 1205. where a *feme covert* had been allowed to acknowledge a fine, her husband being abroad.

The

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The *Court* said, they should make no order upon the subject; but that it appeared to them there was no objection to the acknowledgment of the fine being taken; adding *valeat quantum*.

July 1st.

JOHN DAVENPORT BROMFIELD, an Infant, by his Father and next Friend, *v.* SAMUEL CROWDER, CHARLES BROMFIELD, and JOHN VALE.

Testator devised to *A.* for life, and after her death to *B.* for life, and at the decease of *A.* and *B.*, or the survivor gave all his real estate to *C.* if he should live to attain 21, but in case he should die before that age and *D.* should survive him, in that case to *D.* if he should live to attain 21, but not otherwise, but in case both *C.* and *D.* should die before either of them should attain 21, then to *E.* in fee. Held that *C.* took a vested remainder.

THE following case was sent by the Master of the Rolls for the opinion of the Judges of this Court.

John Davenport, the testator by his will, bearing date the 10th of *November* 1791 (and which was duly executed by him in the presence of and attested by three witnesses, and having first surrendered his copyhold estates to the use thereof), after charging and making chargeable his real and personal estates with the payment of his debts, legacies, funeral expences, and annuities, but directing that no part of his real estate should be applied for that purpose unless his personal estate should be found insufficient, did direct his executors to pay unto his nephew, the above-named Defendant, *Samuel Crowder*, an annuity of 50*l.* during his life, payable quarterly, and declared that the said annuity was given upon the express condition, that if the said *Samuel Crowder* should at any time mortgage, sell, assign, dispose of, or in any manner incumber the same or any part thereof, then and from thenceforth the future payments of such annuity should cease and determine and be at an end to all intents and purposes whatsoever, and the same should be considered as if no such bequest had been made, and no part of the said testator's estate should from thenceforth be charged or chargeable with the payment of the said annuity. And the said testator gave to his godson *John Davenport Bromfield*, the son of Mr. *Charles Bromfield* of *St. Ann's, Liver-*

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pool, Brewer, and the Plaintiff in this cause, the sum of 100*l.*, provided he lived to attain the age of 21 years, otherwise such legacy was not to be paid or payable; and devised unto his wife *Elizabeth Davenport* and her assigns all his real estates whatsoever, to hold to her for her life, and after her decease he, the said testator, gave and devised such estates unto his cousin *Joshua Rose*, his heirs and assigns for ever. The said testator afterwards made and published a codicil to his said will, dated the 28th of *December* 1795 (and which was likewise duly executed by him in the presence of and attested by three witnesses), and such codicil was in part in the words and figures or to the effect following, that is to say, "With regard to that part of my will where I gave my estate to *Joshua Rose* and his heirs for ever, in case he survives my present wife, now I entirely revoke the above part of my will, and only give *Joshua Rose* my estate during the term of his natural life, in case he survives Mrs. *E. Davenport*; and at the decease of Mrs. *E. Davenport* and Mr. *Joshua Rose*, or the longest liver of them, I give all my real estate, of what nature and kind soever, to my godson *John Davenport Bromfield*, son of *Charles Bromfield* of *St Ann's, Liverpool*, if the said *John Davenport Bromfield* shall live to attain the age of 21 years; but in case he die before he attains that age, and his brother *Charles Bromfield* shall survive him, in that case I give my real estate to *Charles Bromfield* his brother, if he lives to attain the age of 21 years, but not otherwise, but in case both the above-mentioned boys die before either of them attain the age of 21 years, then I give my real estate to *John Vale* my godson, and son of Mr. *John Vale* of *Brook-Street, London* and his heirs for ever." The testator died in the month of *February* 1796, leaving the Defendant *Samuel Crowder*, his nephew and heir at law, and also his heir according to the custom of the manor of which his copyhold estates were holden, and the said testator's executors, after his decease, duly proved his will and codicil. In the year 1797,

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1797, a bill was filed in the Court of Chancery on behalf of the creditors of the said testator, for the purpose of having so much of their debts as his personal estate would not extend to pay raised by sale or mortgage of all or a competent part of his real estates, and the personal estate of the said testator being insufficient for the payment of his debts, funeral expences, and legacies, a part of his real estates was sold accordingly for the purpose of making good such deficiency. Pending the proceedings in that cause, and in the month of *February* 1800, the said *Elizabeth Davenport*, the testator's widow, died, and on her death the said *Joshua Rose* entered into the possession and receipt of the rents and profits of the unsold parts of the said testator's freehold and copyhold estates, and was admitted to the copyhold parts of such estates; and the said *Joshua Rose* died on the 27th day of *March* 1802, the Plaintiff *John Davenport Bromfield* being then an infant under the age of 21 years. In *June* 1802, the Plaintiff *John Davenport Bromfield* by his next friend filed his bill in the Court of Chancery against the Defendants above-named, claiming the unsold parts of the said testator's freehold and copyhold estates, and praying (among other things) that his right to the said real estates upon the death of the said *Joshua Rose* might be declared; and the Defendants having put in their answer to the said bill, the cause came on to be heard before the Right Honourable the Master of the Rolls on the 6th day of *December* 1802, and afterwards to be re-heard before his Honour on the 25th day of *June* 1804, and on such re-hearing it was contended and insisted, on the part of the Defendant *Samuel Crowder*, that the Plaintiff had no right or title to the said estates, or any part thereof, for that the devise to him the Plaintiff and to the Defendants *Charles Bromfield* and *John Vale* were contingent remainders limited upon the estates for life devised to the said *Elizabeth Davenport* and *Joshua Rose*, and that inasmuch as the preceding particular estates determined and were at an end

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before the events happened on which the said premises were to become vested, such remainders could not then take effect, and consequently that the said real estates remaining unsold did, upon the death of the said *Joshua Rose*, result and then belonged to him the Defendant *Samuel Crowder*, as the heir at law and customary heir of the said testator. The said Master of the Rolls by his decretal order on the said last-mentioned day, ordered a case to be made for the opinion of the Judges of this Court upon the following questions (that is to say):

1st. Whether the Plaintiff *John Davenport Bromfield*, in the events which have happened, takes any and what estate or interest in the freehold estates of the said *John Davenport* the testator?

2nd. Whether the Plaintiff *John Davenport Bromfield*, in the events which have happened, takes any and what estate or interest in the copyhold estates of the said testator?

This case was argued in *Easter* term by *Williams* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendant, and again in this term by *Shepherd* Serjt. for the former, and *Lens* Serjt. for the latter.

Arguments for the Plaintiff.---The question in this case is, Whether the remainders limited upon the estates for life, devised to *Elizabeth Davenport* and *Joshua Rose*, were contingent or vested remainders? If the remainders were contingent, the tenant for life having died before the Plaintiff attained his age of 21, such remainder cannot take effect, and consequently the estate goes to the heir at law. If, however, upon the construction of the will, the remainder should be considered as vested, the Plaintiff must succeed. Those, who contend that the Plaintiff took nothing but a contingent remainder, might as well contend that *Joshua Rose* took only a contingent remainder; for, as the codicil has limited his estate in case he shall survive Mrs. *Davenport*, it might be said that the

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the estate is thereby made contingent; and yet the devise is nothing more in effect than a devise to Mrs. *Davenport* for life, remainder to *Joshua Rose* for life. In the construction of a will, not only the words but the intent must be considered; and whether a condition be precedent or subsequent, will mainly depend upon the apparent wish of the testator, and the Court will construe it either as the one or the other according as they may best effectuate the intention of the testator, without regard to his particular expressions. Now, in this case, it is a most material circumstance that the testator has expressly noticed in his will the Defendant, who was his heir at law, by giving him an annuity of 50*l.* for his life, payable quarterly, with this condition, that if the Defendant should at any time dispose of any part of it, he should cease to derive any benefit from the devise. This clause most clearly evinces the opinion of the testator with respect to the conduct and prudence of the Defendant, and that he did not mean that the Defendant should have his estate. The Court, however, is desired to construe this a contingent remainder, in order that this Defendant, as heir at law, may take the estate. Such being the intention, the Court will not give a different construction to the will, unless bound to do so by positive authority. The law favours vested estates, because it dislikes estates in abeyance and contingency; and there are many cases where, from the import of the will, it should appear that the estate was in contingency, and yet it has been holden to be vested. Such is *Boraston's* case, 3 *Co.* 19. That was a devise to *A.* and *B.* for eight years, and after that term to remain to the executors of the devisor until such time as *Hugh Boraston* should accomplish his full age of 21 years, the mesne profits to be employed towards the performance of his last will and testament, and when the said *H. B.* should come to his age of 21, then that he should enjoy the said estate to him and his heirs for ever. *Hugh Boraston* died under 21, and it was contended that the re-

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mainder to him was contingent; but the Court held that it was merely a devise to the executors till *Hugh Boraston* attained the age of 21, remainder to his son in fee, and that the adverbs of time "when" and "then" did not amount to make any thing precede the settling of the remainder, any more than in the common case where a man leases for life or years, and after the decease of the lessee or the term ended, gives the remainder to another, in which case the remainder vests presently. In that case, the adverbs of time were holden to denote the time when the estate should come into possession, and not the time when it should vest. That case is a material authority in the present, because the Court resolved that the word "when" did not import a condition precedent, inasmuch as it merely denoted the time when the estate should come into possession. A more modern case to the same effect is that of *Goodtitle d. Hayward* v. *Whitby*, 1 *Burr* 228. where the testator devised to trustees, and the survivor of them and his heirs, in trust to lay out the rents and profits for the maintenance and education of his nephews *T.* and *J. Heywood* during their minorities, and *when* and *as* they should attain their respective ages of 21, that the premises should be and remain to them the said *T. H.* and *J. H.* and their heirs equally. It was resolved that the nephews took the fee immediately, and that the trustees under the limitation to them took only a chattel interest carved out of the freehold devised to the nephews, they holding that chattel interest in trust for the benefit of the infants during their minority. That case was decided upon the intent of the testator, and not upon any technical expressions. It is to be found in *Fearne's Contingent Remainders*, p. 368. ed. 3. with many other authorities, all demonstrating that the intent of the testator must be principally consulted when Judges are endeavouring to ascertain whether a condition be precedent or subsequent. The case, however, of *Edwards* v. *Hammond* seems precisely in point. According to the report of that case in

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3 *Lev.* 132. a copyholder of borough *English*, surrendered to the use of himself for life, and afterwards to the use of his eldest son and his heirs, if he should live to the age of 21 years, provided and on condition that if he should die before 21, then it should remain to the surrenderor and his heirs. On the death of the surrenderor, the youngest son entered, and the eldest son being 17, brought an ejectment, and the only question was, whether the devise to the eldest son was upon a condition precedent or subsequent. The Court resolved that although by the first words it seemed to be a condition precedent, yet that upon all the words taken together it was an immediate devise to the eldest son, subject to be defeated by a condition subsequent, if he did not attain the age of 21, and they compared it to the case of *Spring* v. *Cæsar*, 1 *Roll. Abr.* 415. which was a fine to the use of *A.* and his heirs. if *B.* did not pay him 20 shillings on the 10th day of *September*, and if *B.* paid it, to the use of *A.* for life, remainder to *B.* and his heirs; and it was held not to be a condition precedent, but that the estate in fee vested in *A.* immediately, to be devested on the subsequent payment. These two cases are in point; nor is there any difference between *Edwards* v. *Hammond* and the present case, except that in the former the words are, "provided and on condition," whereas in this the words are, "in case;" a distinction which it would be ridiculous to insist upon. The report of *Edwards* v. *Hammond*, in 2 *Show.* 398. by the name of *Stocker* v. *Edwards*, is not substantially different from that in *Levinz*, and if it were, there can be no doubt that the preference must be given to the authority of the latter reporter. In *Show*, the land is not said to be borough *English*, and the surrender is described to be to the use of the surrenderor for life, and after to the use of the *younger* son, and the heirs of his body, if he attained the age of 18, and if he died before that age without issue male, then to the surrenderor's right heirs. In both cases the surrender is represented as being

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to the use of a person who was not the heir at law, and that the only question was, Whether the estate vested immediately? and Mr *Fearne*, p. 372. cites it as one of the cases in which words which seemed to import a condition precedent were holden to make a condition subsequent. In addition to these authorities, the case of *Robinson* v. *Comyns*, *Cus. temp. Talbot*, 164. and *Acherley* v. *Vernon*, *Willes*, 153. may be referred to as demonstrating that no technical words are necessary to distinguish conditions precedent or subsequent, but that the same words may create either according to the apparent intention of the testator. Supposing, however, the Court should be of opinion that the remainder in question is a contingent remainder, and therefore, with respect to the freehold property, the devise never took effect, still the Plaintiff will be entitled to the copyhold; for no principle can be more clearly established than that trustees to preserve contingent remainders are unnecessary in copyhold estates, the freehold which supports the remainder being in the lord. This principle was laid down in 2 *Roll. Abr.* 794. pl. 6., in *Pawsey* v. *Lowdall*, *Sty.* 249, 273, and has since been recognized in *Mildmay* v. *Hungerford* 2 *Vern.* 243.

Arguments for the Defendant.—The case of *Edwards* v. *Hammond*, as cited from 3 *Lev.* is distinguishable from this case, and indeed ought not to be cited at all as an authority; for the report of the same case in *Shower* differs materially from it. In the report of *Levinz*, a material part of the limitation is omitted, for it there appears as if the limitation was to the party for life only, whereas the report of *Shower* shews it to have been a limitation to the first taker and the heirs of his body, if he should attain the age of 18, and if he died before that age without issue male, then to the right heirs of the surrenderor. It was for the purpose of protecting the estate of the issue male, which it was the manifest intention of the testator

should

should be protected, that the Court did some degree of violence to words which *primâ facie* imported a condition precedent. According to the report in *Levinz*, it was a special verdict in ejectment, and it was stated to be a surrender by a copyholder of borough *English*, to the use of himself for life, and after to the use of his eldest son, if he should attain 21, provided and upon condition that if he died before 21 it should remain to the surrenderor and his heirs. The question was, Whether it was a condition precedent or subsequent? and the Court held, that though by the first words it seemed to be a condition precedent, yet, taking the whole will together, it must be held to be a limitation to the eldest son immediately defeasible on a condition subsequent. Mr. *Fearne's* book has been cited for an observation upon this case, but the whole passage was not stated. In p. 171. he says of this case, "it was evidently the intent that the estate should not go to the heirs of *A*, if the younger son died before 18 leaving issue male; but if the estate was not to vest till he attained the age of 18, this intent could not have been satisfied." It is evident, therefore, that the ground of that decision was the protection of the issue male, to effect which some violence was done to the words of the will. But in the present case, there is not the same necessity for doing violence to the words of the will, the limitation not being "if he shall die under 21 without issue," but simply "if he shall die under 21." In *Boraston's* case, the question whether the words used should be considered to be a condition precedent or subsequent, turned upon the intent of the testator; and the Court thought that words which naturally imported a condition precedent should not have that construction in that particular case. The same reasoning was adopted in the case of *Goodtitle d. Hayward* v. *Whitby*; the decision in which equally turned on the intent of the testator, though the words imported a condition precedent. The Court in these cases thought that the testator only meant

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there is always a tenant to the *præcipe*. This was the clear opinion of Lord *Talbot* in *Chapman* v. *Blissett*, *Cas. Temp. Talbot*, 145. Now in the case of copyholds, there is no doubt that the whole freehold remains in the lord, the copyholders being mere tenants at will according to the custom; therefore if the lord mortgage his manor and afterwards purchase a copyhold, the copyhold is mortgaged as much as if the lord had purchased it before the mortgage. *Doe. d. Gibbons* v. *Pott*, *Dougl.* 710. Or if the lord devise his manor and afterwards purchase copyholds, they will pass.

Cur. adv. vult. (a)

The opinion of the Court was now pronounced by

Sir JAMES MANSFIELD Ch. J. (who, after stating the will proceeded thus)-All the testator's real estate is given to the Plaintiff immediately on the death of the preceding devisees, if he live to attain 21; if he die before 21, and his brother *Charles Bromfield* survive, then the testator gives his real estate to the said *Charles Bromfield*, if he

(a) The record of the case of *Edwards* v. *Hammond* was searched for and produced by desire of the Court, from which it appeared that the premises in question were customary lands held of the manor of *South Burstead* in *Essex*, in which there was a custom that the youngest son should inherit, and that the widow of the tenant in fee should have her free-bench; that *John Hammond* the elder surrendered the reversion of the premises in question, dependant on his mother's free-bench, to the use of himself for life, and after his decease to the use of *John Hammond* the younger (his eldest son,) "and his heirs and assigns for ever, if it shall happen that the aforesaid *John Hammond* the younger shall live until the aforesaid *John Hammond* attain the age of twenty and one years; provided always and under the condition nevertheless that if it shall happen that the aforesaid *John Hammond* the younger shall die before he attain the age of twenty and one years," then to remain to the use of *John Hammond* the elder and his heirs; that the mother died in the lifetime of the surrenderor; that the surrenderor died leaving issue the said *John* the younger, his eldest son, and *Thomas* his youngest son; that *John Hammond* the younger was admitted according to the surrender; that the Defendant, *Ann Hammond*, was the widow of the youngest son, who entered on the death of his father, and that *John Hammond* the younger (the eldest son) being then fifteen, brought an ejectment against *Ann Hammond*, his brother's widow; that judgment was given for him upon special verdict in the Common Pleas, and afterwards a writ of error brought.

live

live to attain 21, but not otherwise. If both die under 21, then he gives it to his godson *John Vale* in fee. The Plaintiff was under 21 at the time of the death of the surviving devisee, and the question is, Whether he took any and what estate in the freehold or copyhold premises? There does not appear to us to be any distinction between the freehold and copyhold. In fact, this is an immediate devise to the Plaintiff, to take place on the death of the two preceding devisees. If so, we must either break in upon the terms of the will, or give them effect. In the latter case, there is an end of all argument about the word "if." There is nothing in the will to prove that the testator meant the Plaintiff not to take a vested estate unless he survived 21. Indeed the true sense of the thing is, that the devisor meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under 21. It must be admitted, that according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always controul particular expressions. Now the fairest construction that can be put upon this will, independent of authority, is, that the Plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent. With respect to the cases, that of *Edwards* v. *Hammond* is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference; for it is clear that the testator meant no one to take his estate unless in the event of the Plaintiff dying under 21. *Edwards* v. *Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word "if" implies a condition precedent, unless it be controlled by other words. But, in this case,

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case, there is a variance between the expression and the meaning, and the case of *Edwards* v. *Hammond* sanctions us in giving effect to the latter. On these grounds, we are of opinion that the estate vested in the Plaintiff on the death of the preceding devisees; and the expression, all my estate, is so general as to pass an estate in fee. Besides, it would be an absurdity on the face of the will, to construe it only an estate for life.

The following certificate was afterwards sent to the Master of the Rolls:

This case has been argued before us by counsel, and we are of opinion that, in the events that have happened, the Plaintiff *John Davenport Bromfield* takes a vested estate in fee simple in the freehold and copyhold estates of the said *John Davenport* the testator, determinable upon the contingency of his dying under the age of 21 years.

J. MANSFIELD.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

July 2d.

OWEN and Another *v.* WARBURTON.

The Court will not set aside a verdict upon the affidavit of a juryman that it was decided by lot.

THIS was an application for a new trial in this cause, which was tried at *Chester*, on the ground of misconduct in the jury. Two affidavits were produced in support of the motion; one by *Ralph Bridge* the foreman of the jury, and one by a person of the name of *Chapman*. The material facts sworn to by *Bridge* were, that the jury not being agreed left the Court and were put into a room by themselves; that four were disposed to find a verdict for the Defendant, and eight for the Plaintiffs; that one of those disposed to find for the Plaintiffs swore he would stay there till *Saturday* evening before he would find a verdict for the Defendant; that after some hours had elapsed in fruitless endeavours by *Bridge*

Bridge to alter the opinions of those who inclined to a verdict for the Plaintiffs, it was proposed by several of the jury to draw lots, to which he *Bridge* was induced to assent; that accordingly two pencils were produced of different lengths, and it was agreed that the longest pencil should be for the Plaintiff and the shortest for the Defendant; that *Bridge* held the pencils and another juryman drew, and that the longest pencil being drawn, the jury went to the Chief Justice's lodgings and those of the jury who were for the Plaintiffs gave in the verdict for them. *Chapman* swore that he followed the jury when they went to the room, and stood at the outside of the door, where he heard the jurymen arguing very violently and disputing with each other; that after some time he heard a proposal made by some of the jury to draw lots whether the verdict should be given in favour of the Plaintiff or the Defendant; that they were quiet for some time, and then came out of the room and went to the Chief Justice's lodgings, after which he was told by several of the jurymen how the verdict was, and the mode in which it had been decided. Upon these affidavits a rule *nisi* for a new trial was granted.

Cockell Serjt. in the course of the last term shewed cause and relied on the case of *Vaise* v. *Delaval*, 1 *Term Rep.* 11. where the Court of *King's Bench* under similar circumstances refused to receive the affidavits of jurymen, such conduct being a very high misdemeanor in them, and observed that in such cases the Court must receive their information from some other source. He also cited the case of *Jackson* v. *Williamson and Others*, 2 *Term Rep.* 281. where the Court of *King's Bench* refused to amend the *postea* upon the unanimous affidavit of the jury that the 30*l.* damages given in by them and recorded as their verdict was in addition to a sum of 31*l.* which had been proved to be the price actually received by the Defendants for

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for the sale of the Plaintiff's property, which had been sold 30*l.* under its value, the Court saying that it would introduce a very dangerous practice. He observed, that without the affidavit of *Ralph Bridge*, there was no evidence of the verdict having been decided by lot, but only of a proposal so to decide it.

Williams Serjt. in support of the rule. In the case of *Hale* v. *Cove*, 1 *Stra.* 642. the Court set aside a verdict because the jury had decided it by lot, even though it happened to be according to the evidence and opinion of the learned Judge. If the affidavit of *Bridge* be false, it may very easily be contradicted; but the evidence of *Chapman* is strongly confirmatory of the facts to which *Bridge* deposes. Herein there is a great difference between this case and the case of *Vaise* v. *Delaval*, for the jurymen there who made the affidavit were not at all confirmed by any third person. Indeed it is too much to infer from that case, that under no circumstances whatever the affidavit of jurymen shall be received by the Court. Judges ought not to lend too easy an ear to applications of this kind; but still they should take care that verdicts are not obtained by improper methods. In *Vaise* v. *Delaval*, the Court were not put in possession of several existing cases in which affidavits of jurymen have been received or required by the Courts. Thus in *Phillips* v. *Fowler*, *Barnes*, 441. *Com.* 525. a verdict was set aside on the affidavit of two jurors that it had been decided by casting lots, though the application was made after a motion in arrest of judgment, and was therefore objected to as too late, the Court observing that though the disclosure was after the motion in arrest of judgment, yet as it was before judgment they must receive it. In *Aylett* v. *Jewell*, 2 *Bl.* 1299. where the jury, not being able to agree in their verdict, wrote the names of the jurymen on slips of paper, and shaking them together, left the decision of

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of the verdict to the first six which were drawn, the Court refused to grant a new trial, because this matter was only brought before them by the affidavit of the attorney to whom several of the jury had confessed it, "there being no affidavit of the jurymen or any other that was cognisant of this transaction." It was resolved in 2 *Lev.* 139. that a verdict decided by lot must be set aside, and the case of *Hall* v. *Cove* shews that it matters not whether the verdict be right or wrong. In *Parr* v. *Seams*, *Barnes*, 438. on a question whether a verdict decided by hustling halfpence in a hat ought to be set aside or not, the Court stayed the entry of the final judgment to give the Plaintiff an opportunity of procuring affidavits from some of the jurors, because the fact was only stated to them by affidavit of a person to whom two of the jury had confessed.

After the argument, Sir *James Mansfield* Ch. J. observed, that the authorities upon the subject being contradictory, it was fit that the point should be settled one way or the other, and therefore it would be right to consider the case before any opinion was delivered. His Lordship observed, that it was singular to refuse to set aside the verdict on the evidence of jurors when that evidence was before the Court, though perhaps it would have been the wiser way to refuse to entertain any motion of this kind; at the same time thinking that evidence should be received with a view to punish the jurymen who had so misconducted themselves.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Sir JAMES MANSFIELD Ch. J. We have conversed with the other Judges upon this subject, and we are all of opinion that the affidavit of a juryman cannot be received. It is singular indeed that almost the only evidence of which

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the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him. We are therefore of opinion that there is no ground to support this rule.

Per Curiam, Rule discharged.

BROOKE and Others *v.* WHITE.

July 2d.

If goods be sold at two months credit, to be paid for by a bill at 12 months, and the goods be not paid for after the expiration of the 14 months, the vendor may recover in an action for goods sold and delivered.

THIS was an action for goods sold and delivered. At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings after last *Easter* term, it appeared that the goods in question were originally sold at two months credit, to be paid for by a bill at 12 months; that more than 14 months had elapsed between the delivery of the goods and the commencement of the action, and that the goods had not been paid for; whereupon his Lordship directed the jury to find a verdict for the Plaintiff, at the same time giving leave to the Defendant to move that a nonsuit should be entered.

Accordingly, *Best* Serjt. now moved to enter a nonsuit, and insisted that the Plaintiff could not maintain this action, but ought to have declared upon a special contract; that the principles upon which the former cases on this subject had been decided did not turn upon the question whether the period of credit had expired or not, but

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but whether the contract of sale were general or special; that the mere circumstance of the period of credit having expired could not convert a special contract into a general sale of goods, and that the action therefore should have been brought for not having given the bill agreed upon, for that where any thing is agreed to be done besides the mere payment of the money, the contract is not a sale but a special agreement; and he observed that in *Dutton* v. *Solomonson*, 3 *Bos. & Pull.* 582. which was the last case upon the subject, Lord *Alvanley* expressed his opinion of the necessity of declaring upon the special contract, as well after the expiration of the period of credit as before.

Sir JAMES MANSFIELD Ch. J. When a person sells goods upon a certain credit, to be paid for by a bill at a certain date, he can maintain no action for goods sold until the expiration of the period at which such bill would become due, because the goods are not agreed to be paid for till that time: if the bill be not given, he may bring an action on the special contract, because he is deprived of the particular security agreed upon, but when the whole time is expired, and no bill has been given, why may he not bring an action for the money which is then due? After the expiration of the period of credit, it is of no use to give the bill, for the party is then entitled to receive his money.

HEATH J. I have always understood that when a contract is executory the party must declare specially, but that when it is executed he may declare generally. There is a case in *Wilson* (a) which is decisive on this point.

ROOKE J. I apprehend that this distinction will be found in all the cases, that the Plaintiff can only recover upon a special action until the time of credit has expired;

(a) Probably Mr. Justice *Heath* alluded to the case of *Alcorn* v. *Westbrook*, 1 *Wils.* 115.

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but that when that has expired he may have a general action.

CHAMBRE J. The qualifications respecting the mode of payment are introduced for the benefit of the purchaser, and during the time to which they relate, the seller must sue on a special contract; when that time is expired the money is absolutely due. No authority in point has been cited for the Defendant, and if any thing dropped from Lord *Alvanley* upon the subject, it was extra-judicial.

Best Serjt. took nothing by his motion.

May 27th.

DOE, on the Demise of WILLIAM BOTHELL, *v.* MARTYR.

The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant.

EJECTMENT for certain premises, situate at *Dorking* in the county of *Surry*.

At the trial of this cause before *Heath* J. at the last *Lent* assizes, the following facts appeared in evidence. By indentures of lease and release, bearing date the 27th and 28th of *February* 1750, reciting a deed of 1728, under which the legal estate of the lands in question was vested in trustees for the use of one *William Bothell*, and that the said *William Bothell* was desirous to settle the lands as after-mentioned, the said *William Bothell* conveyed to *J. S.* and *J. B.* and to their heirs, to hold to and to the use of the said *J. S.* and *J. B.* upon trust to permit the said *William Bothell* to receive the rents during his life, and after his decease upon trust to pay the rents to any children of the said *William Bothell* till they should come of age, and then to convey to them as tenants in common; and on failure of issue of *William Bothell* upon trust

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trust to convey the same to *William Dudley* and his heirs, and until such conveyance to stand seised thereof to the use of *William Dudley* and his heirs. *William Dudley* died in the lifetime of the said *William Bothell*, having by his will duly executed devised the premises to *John Bothell* of *Mare House* and his heirs. *John Bothell* of *Mare House* also died in the lifetime of *William Bothell* (the settlor in 1750), and the lessor of the Plaintiff *William Bothell* was the brother and heir at law of the said *John Bothell* of *Mare House*. In 1795, *William Bothell* (the settlor in 1750) executed deeds of lease and release, bearing date the 3d and 4th of *June*, by which, in consideration of 475*l.* (the receipt of which was indorsed on the deed), to him paid by *Thomas Bothwell* of *Dorking* bricklayer, he conveyed the premises in question to the said *Thomas Bothwell*, his heirs and assigns, for ever. *Thomas Bothwell*, in pursuance of this deed, entered into possession of the premises, giving to old *William Bothell*, (the settlor in 1750,) a bond for 450*l.* the purchase-money. This bond was never paid by *Thomas Bothwell*, who was no relation to old *William Bothell*, and was in very mean circumstances. Old *William Bothell* was a very weak man; he died in *December* 1802 without issue. In *February* 1796, *Thomas Bothwell* sold and conveyed the premises in question to the Duke of *Norfolk* for a valuable consideration paid by him, without any notice of the deed of 1750, or of any fraud in the conveyance of 1795. The jury found a verdict for the lessor of the Plaintiff, saying that they thought the conveyance to *Thomas Bothwell* in 1795 was fraudulent.

A rule *nisi* having been obtained on a former day for setting aside this verdict and having a new trial,

Best Serjt. now shewed cause. The Duke of *Norfolk*, being a purchaser from *Thomas Bothwell*, must stand or fall by his title. If a contrary rule were to be established, a

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man who has obtained an estate by fraud, has nothing to do but to convey that estate to a *bonâ fide* purchaser for a valuable consideration, and he will thereby secure to himself the fruits of his own fraud. By *27 Eliz. c. 4. s. 2.* conveyances made with a view to defeat prior titles are declared to be "utterly void, frustrate, and of no effect." If such a construction be put upon the *27 Eliz.* as is necessary in this case for the support of *Thomas Bothwell's* title to sell, the statute will most properly be called a statute to protect fraudulent conveyances. How can a person convey a good title to a purchaser, when in his own hands the estate is a perfect nullity? In *Doe.* v. *Routledge, Cowp.* 708. Lord *Mansfield* says, "the statute does not say a voluntary settlement shall be void, but that a fraudulent settlement shall be void. There is no part of the act of parliament which affects voluntary settlements *eo nomine*, unless they are fraudulent." In this case, the jury have found that the conveyance to *Thomas Bothwell* was fraudulent.

Shepherd and *Bayley* Serjts. *contrà* insisted that the Duke of *Norfolk*, being a purchaser for a valuable consideration without notice of the deed in 1750, was protected; that old *Bothell* himself, if alive, could not defeat the conveyance to the Duke, for that though the deed, as between old *Bothell* and *Bothwell* might be fraudulent, yet the Duke, having purchased for value and without notice, stood in the same condition as if the person from whom he took had not taken under a fraudulent deed. They cited *Prodger* v. *Langham*, 1 *Sid.* 133. *Andrew Newport's* case, 1 *Skyn.* 423 and *Smartle* v. *Williams*, 3 *Lev.* 387. to shew that a deed, which was void in its creation, might be made good by matter *ex post facto*.

The Court were very clearly of opinion that the rule for a new trial must be made absolute; and Sir *James Mansfield*

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Mansfield Ch. J. observed, that they could not, without overturning the settled and decided law, hold that a prior voluntary conveyance could defeat a conveyance to a purchaser for a valuable consideration; he referred to the case of *Evelyn* v. *Templar*, 2 *Brown Chanc. Rep.* 148. and *Newstead* v. *Serle*, cited by Lord *Mansfield* in *Doe* v. *Routledge*, *Cowp.* 708., in both which cases subsequent *bonâ fide* purchases were held good, notwithstanding prior voluntary settlements; and regretted that it had ever been decided, as was the case in *Evelyn* v. *Templar*, that even notice of the prior settlement would not defeat such a purchase.

Per Curiam, Rule absolute.

JOHN DOE, on the several Demises of SALLY WRIGHT Widow, and JAMES CAMPER WRIGHT Esquire, *v.* EDWARD CHILD and MARY his Wife.

July 2d.

THIS was an ejectment brought to recover the possession of certain premises, part freehold and part copyhold, in the several parishes of *Great Stambridge*, *Little Wakering*, *South Shoebury*, and *Paglesham*, in *Essex*. The first demise by *Sally Wright*, and the second by *James Camper Wright*, being laid on the 2d *January* 1796; the third demise by *Sally Wright*, and the fourth

The devisor, after using these introductory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me, I give and dispose of the *same* in the following manner," gave an estate for life to his wife in all his freehold, leasehold, and copyhold, and after her death gave "all his lands, houses, &c. in manner following;" to *A.*, one of his grandsons, he gave "all his lands, freehold, copyhold, and leasehold in *E.*," and proceeded "also I devise all my *estate* freehold and copyhold in *H.*" to him; to *B.*, another grandson, he gave all his *estate*, lands, &c. called or known, &c. with 500*l.*; and to *C.* his remaining grandson and his heir at law, "the house I now live in, with all the lands, &c. belonging to the same, and also all my houses and lands commonly called or known, &c. and also 500*l.*" Held that *A* took only an estate for life in remainder in the devisor's estate in *E*

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by *James Camper Wright*, being laid on the 2d *January* 1799. The cause was tried before Mr. Justice *Heath* at the *Essex* Summer Assizes 1804, and a verdict found for the Plaintiff, subject to the opinion of the Court, on the following case:

James Camper, being seised and possessed of divers freehold, copyhold, and leasehold estates in *Essex*, *Middlesex*, and *Huntingdonshire* (of which the premises in question are part), by his will, bearing date the 28th day of *January* 1763, and which was duly executed so as to pass his real estates devised in the following words: "And as touching such worldly and personal estates wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner: *Imprimis*, I give and devise unto my loving wife *Sarah Camper*, all my lands, houses, *&c.* freehold, copyhold, and leasehold, whatsoever and wheresoever, and to receive the rents and profits thereof during her natural life; and also all my deeds, mortgages, bonds, and writings, of what name, denomination, or title soever; and also all my stock, goods, chattels, effects, and personal estate whatsoever and wheresoever, she paying thereout the legacies hereinafter given and disposed of; and I do hereby nominate and appoint my loving wife *Sarah Camper* to be sole executrix of this my will; and after her natural life, my mind and will is and I do hereby order, direct, give, devise, and bequeath all my lands, houses, *&c.* freehold, copyhold, and leasehold, in manner following: I give and devise unto my grandson *James Wright* all my lands, freehold, copyhold, and leasehold, in the county of *Essex* (except herein excepted and reserved the house I now live in), with all the lands, yards, out-houses, stables, and all other conveniences and appurtenances thereunto belonging and to be thereinafter disposed of; also I give and devise unto my grandson *James Wright* all my *estate*, freehold and copyhold lying

lying and being in the town of *Ellington* in *Huntingdonshire;* and also I give, devise, and bequeath unto my grandson *John Wright* all my estate, lands, &c. known and called by the name of the *Coal Yard* in the parish of *St. Giles, London;* also I give and devise unto my grandson *John Wright* the sum of 500*l.* to be paid in six months after my decease; and I give and devise unto my grandson *James Camper* the house I now live in, with all the lands, yards, out-houses, and all the appurtenances belonging to the same; and also my houses and lands, commonly called and known by the name of *Castle Yard* in *Holborn, London,* and now in the tenure or occupation of *George Oldmixon* esquire; also I give and devise unto my grandson *James Camper* 500*l.* to be paid when he shall attain the age of 21 years." The said testator *James Camper* duly surrendered such part of the premises in question as are copyhold to the use of his said will, and afterwards departed this life in the said month of *January* 1763, without having altered or revoked his said will, leaving *Sarah Camper* his widow, and his said three grandsons, *James Wright, John Wright,* and *James Camper,* who was also his heir at law. Upon the death of the said testator, his widow *Sarah Camper* entered into the possession of the said freehold and copyhold lands in the county of *Essex,* and continued in possession of the same, together with the other property devised to her by the said testator, during her life; and upon her death, the said *James Wright,* the testator's grandson and devisee in his will named, entered into the possession of the said lands in *Essex,* and continued in such possession till his death, which happened in *July* 1795, leaving *James Camper Wright,* one of the lessors of the Plaintiff, his heir at law; and thereupon the said *James Camper Wright,* and *Sally Wright,* the other lessor of the Plaintiff, or one of them, entered into the possession thereof as the devisees named in the will of the said

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said *James Wright*, and the said lessor of the Plaintiff, *James Camper Wright*, was duly admitted to the said copyhold. *James Camper*, the grandson and heir at law of the said testator, departed this life in the year 1768 intestate as to the said freehold and copyhold lands in *Essex*, leaving the Defendant *Mary Child*, his only child and heir at law, and also heir at law of the said testator. The said Defendants, *Edward Child* and *Mary* his wife, brought an ejectment on their joint demise against the lessors of the present Plaintiff for recovery of the lands and premises in *South Shoebury* and *Paglesham*, and obtained judgment thereon in *Michaelmas* term 1798, and by virtue thereof entered into possession not only of the premises in *South Shoebury* and *Paglesham*, but also of the premises in *Great Stambridge* and *Little Wakering*, and the said Defendants have or one of them hath been admitted to the said copyhold, and they are now in possession of all the said premises, as well freehold as copyhold.

The question reserved for the opinion of the Court was, Whether the lessors of the Plaintiff or either of them were entitled to recover the possession of the said freehold and copyhold lands.

This case was first argued in *Trinity* term 1804 by *Williams* Serjt. for the lessors of the Plaintiff, and *Best* Serjt. for the Defendant; and again in *Hilary* term 1805 by *Shepherd* Serjt. for the former, and *Lens* Serjt. for the latter.

Arguments for the lessors of the Plaintiff. The question is, Whether *James Wright* took an estate in fee or only for life? There are no words of limitation added to the devise, and therefore, according to the rule of law laid down in *Roe d. Bowes* v. *Blacket*, *Cowper*, 238, it is only an estate for life, "unless it can be found from the whole of the will taken together, and applied to the subject

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ject matter of this devise, that the testator's intention was to give a fee;" but if, from the whole will so taken together and applied to the subject matter, such an intention can be collected, the Court, according to the same case, ought to give it effect. No technical words are necessary to give a fee. The word "estate" carries a fee, because it shews an intention to give the whole interest, yet that is not a technical word; and it will be admitted that the devisee of the *Huntingdonshire* estate would take a fee under the will. If the testator had employed technical expressions to give a fee in his *Huntingdonshire* estate, it might have afforded ground for limiting the devise of the estate in *Essex* to an estate for life; but as he has used words of common parlance throughout the whole will, they must be construed according to the obvious meaning of the expressions. In the introductory clause, he speaks of his worldly and personal estate, and then says, "I devise and dispose of the same in manner following." Now the words "the same" are words of reference, and if it appeared to be his intention to dispose of the whole interest, may be coupled with the word "estate" which precedes them, in which respect this case differs materially from that of *Denn* v. *Gaskin*, *Cowp.* 657. where the introductory clause was not connected with the devise by any words of reference. Introductory words have been considered of weight in shewing the testator's intention to give a fee in many cases, as in *Ibbetson* v. *Beckwith*, *Cas. temp. Talb.* 157. and in *Frogmorton d. Brampstone* v. *Holyday*, *3 Burr.* 1618. Lord *Mansfield* and *Wilmot* Js. thought the introductory clause very material to shew that the testator's whole worldly estate was in contemplation, and the latter thought it much the same as if it had been repeated in each clause. In that case, there were no words of limitation, but the testator's intention being apparent, the Court gave it effect. So in the case of *Grayson* v. *Atkinson*, *1 Wils.* 333. in which no words

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words of limitation were used, the Court, in order to give effect to the testator's intention, connected a general residuary clause with the words temporal estate in the introductory clause, and so gave a fee. It is not contended that introductory words alone will give a fee, but where the intention is apparent from the whole will, a particular devise may be coupled with the introductory words to give effect to the testator's intention. The case of *Maunday* v. *Maunday*, 2 *Stra.* 1020. *Cas. temp. Hardw.* 142. proceeded upon this principle, and in *Smith* v. *Coffin*, 2 *H. Bl.* 444. the words "worldly estate" in the introductory clause were allowed to enlarge the expressions in the residuary clause. In these different cases, the words by which the introductory clause was connected with the subsequent part of the will, were "of the same," "thereof," "and of it," which must be considered as synonimous. The intention of this testator to give the same estates to all his grandsons is manifest; he devises to them all in nearly the same terms, not making use of any technical words; and, in order to make up an equality, he gives to his grandson *John Wright* the sum of 500*l.* and unless *James Wright* were to take a fee, he might never receive any benefit equal to 500*l.* It is admitted that *James Wright* took a fee in *Huntingdonshire*, and as the word "estate" is used in the devise to *John Wright*, he must take a fee in the lands devised to him; the remaining devisee, *James Camper*, was the testator's heir at law, and as there is no devise of the reversion, he must have intended that his heir at law should have a fee, since it would have descended to him independent of the will; yet in the devise to his heir at law he neither uses the word "estate" or any words of limitation, but devises in much the same terms as he had devised to *James Wright* the lands in question. It must be concluded, therefore, that the testator considered such a devise as sufficient to carry a fee. The rule laid down by Lord *Vaughan*,

Vaughan in *Gardiner* v. *Sheldon*, *Vaughan*, 262. that an heir shall never be disinherited, except by express words or necessary implication, has been over ruled; the rule, according to *Willes* Ch. J. in *Moone* v. *Heaseman*, *Willes*, 141, is, that the intention of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited.

Arguments for the Defendant.—It has not been shewn that the will contains any words by which the introductory clause is coupled with the subsequent devise. It is true that the word "same" is a word of reference, and relates to the introductory clause, but it is not sufficiently connected with the devise to make the introductory words operate upon them. The words "of the same" have been said to be synonimous with "thereof," but it was decided in *Goodwright d. Baker* v. *Stocker*, 5 *Term Rep.* 13. in which the word "thereof" was used, that the introductory words were not sufficient to carry a fee. As to the supposed intention of the testator, there would be no inconsistency in giving a larger portion to his grandson by his son than to either of the grandsons by his daughters; there is nothing to shew his intent to give equal portions, for as the values of the respective lands devised do not appear, it cannot be inferred by the bequest of 500*l.* that he intended thereby to create an equality. The case of *Frogmorton* v. *Holyday* was not decided upon the effect of the introductory words, but turned upon the effect of a charge which the Court thought sufficient to carry a fee. In *Ibbetson* v. *Beckwith* the will contained the word "estate." So in *Maunday* v. *Maunday* the question was, Whether a devise of ground-rents to the testator's younger children and their heirs was sufficient to carry the reversion in the land, there being a manifest intention to disinherit the heir at law. And in *Smith* v. *Coffin* the will contained a residuary devise of all the testamentary estate.

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Lord Chief Justice *De Grey* in *Frogmorton* v. *Wright*, says, "though the probable intent of the testator was an absolute disposition, yet it is not a certain intent, nor is it a legal disposition. There is no case where the introduction of the will only has been held to give a fee, where the words of the devise import an estate for life; and though sometimes the devise of an *estate* may carry a fee simple, yet a devise of an house will not do it." These words may be applied to the present case, which is a devise of lands only without any thing to give the inheritance. In the case of *Right d. Mitchell* v. *Sidebotham*, 2 *Dougl.* 759. there was the strongest reason to conjecture that the testator meant to give a fee of the lands in question, for after a general introductory clause respecting his worldly goods and estates, the testator devised to his wife, her heirs and assigns, "all his lands in *A.*," and then gave and bequeathed to his wife aforesaid all his lands, tenements, and houses in *B.*, and made her sole executrix; yet the Court held that the wife took only an estate for life in the lands in *B.* Lord *Mansfield* saying that the rule of law was established and certain; that express words of limitation or words tantamount are necessary to pass an estate of inheritance; and *Buller* J. that it was impossible for the Court to make that only one devise which the testator had made two.

The opinion of the Court was this day delivered by

Sir JAMES MANSFIELD Ch. J. This case has been long depending, not so much on account of any doubts entertained by my brothers as by myself; the rest of the Court being of opinion that the Defendant is entitled to judgment; and though I now defer to the opinions of my brothers and the Judges of the court of *King's Bench* (*a*), yet I must declare that if it had fallen to my lot only to

(*a*) See *Doe d. Child* v. *Wright and Others*, 7 *T. R* 64. where the same question, arising upon the same will, was argued and decided.

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decide the case, I should have decided it in favour of the lessor of the Plaintiff. It is not necessary that I should state the will at large, but, as an apology for having so long adhered to my opinion against the great authority both of my brothers and of the Judges of the Court of *King's Bench*, I will refer to those parts of it which made an impression upon my mind. The will begins with these general words: "As touching such worldly and personal estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in manner following; *imprimis*, *&c.*" Now the first circumstance which induced me perhaps too hastily to form an opinion of which I have never been able to divest myself was this introductory clause, which according to several authorities seemed to me to denote an intention in the testator not to die intestate as to any part of his property. There may be some question whether these words are so connected with the premises in dispute as to have the effect attributed to them in former cases. Arguments of this sort are extremely nice. But it appeared to me that the words were so placed in the will, and were so followed by the disposition of the several parts, as to render it very improbable that the testator meant to die intestate as to any part of his property. It is observable that he includes freehold, copyhold, and leasehold in the devise in question; and there can be no doubt that the leasehold passed absolutely by the general words. It is also observable that he gives an express estate for life to his widow; and it appears that he intended to make a general disposition of his fortune among his three grandsons, two sons of his daughter, and one son of his son. This circumstance also made an impression upon me, and seemed to shew the general intention. It is further observable that in one devise the testator uses the word "estate," where he gives his property in the county of *Huntingdon* to his same grandson

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grandson *John* without words of limitation; and it is admitted that the devisee takes an estate in fee in the premises situated in *Huntingdonshire* by reason of the word "estate." That word is not used with respect to the premises in *Essex*. To impute an intention to give different estates in premises which are disposed of in the same general way without words of limitation, is to suppose a very improbable thing; and, if the testator meant to give only an estate for life in the lands in *Essex*, he could not have intended to give a larger estate in the lands in *Huntingdonshire*; and *vice versa*, if he intended to give a fee in *Huntingdonshire*, he must have intended to give the same in *Essex*. The argument may be applied both ways. Those, who think that he intended to give a fee, will say that the word "lands" ought to be enlarged by the word "estate;" and those, who think that only an estate for life was intended, will say that the word "estate" should be restrained by the word "lands." The last circumstance which weighed with me was the devise to the heir at law, which is made in the same general manner without words of limitation. The testator must have known that the son of his son was his heir at law; and if he did know it, it appears to me most incomprehensible that he should give that grandson an estate for life by his will in premises of which he made no other disposition. Every man knows that an estate undisposed of goes to his heir at law; the testator must therefore have known that he was only giving part of that which would descend to the devisee if not given at all. It seems to me therefore impossible but that by the general words of devise to his heir at law, he must have intended to give him a fee; and if he did mean to give a fee to his heir at law, it is difficult to suppose that he did not mean to give the same estate to his other grandsons, since he makes use of the same words. These are the circumstances which, from

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the first reading of this case, have made an impression upon my mind, which unfortunately differs from that entertained by seven learned Judges. Though I am bound therefore to say that this is still my opinion, yet I entertain it with great doubts of its solidity. Many cases have been cited, on which it would be wasting time to observe. The result of them appears to me to be this, that an heir at law is not to be disinherited unless by words of limitation, or by expressions which directly or by inference beyond all doubt shew an intention to give an estate in fee to the devisee; and if any of the authorities come up to the present case, my opinion is certainly wrong. Many of them are very strong, especially that in the House of Lords of *Doe* d. *Mellor* v. *Moore* (*a*). My brother *Heath* indeed has furnished me with a case which is stronger than any, but to which I never could have agreed. It is *Spirt* v. *Bence*, *Cro. Car.* 368. The testator had three sons, *Thomas*, *Francis*, and *Henry*. He first devised lands to *Thomas* and the heirs male of his body, remainder to *Francis* and his heirs. Then other lands to *Francis* and the heirs male of his body, remainder to *Henry* and his heirs. Then other lands to *Henry* and his heirs. After this he devised other premises to *Henry* without words of limitation; and again other premises to *Henry* and his heirs, remainder for want of heirs of his body to *Francis* for ever. And because the word "heirs" was not immediately connected with every part of the disposition to *Henry*, the Court thought that he took only an estate for life in those premises to which no words of limitation were added. This is certainly a very strong case. The others I shall not go through, as my opinion is founded upon the particular circumstances of this case as distinguishing it from others. At the same time I cannot entertain this opinion without admitting that in almost

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(*a*) 1 *Bos. & Pul.* 558.

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all the cases where questions of this sort have arisen it has been next to impossible, out of a Court of Justice, to doubt of the testator's intention to give the thing absolutely to the devisee. When a man gives a house, he supposes that he gives it in the same manner as he gives a personal chattel. On the other hand, it may be said that as the common sense of mankind proves the intention to give an absolute estate, particular circumstances indicating such intention cannot prove it more strongly than the general devise; and that nothing therefore ought to be relied upon but express words in the will. And this certainly is the safest side; for it cannot be denied that where wills are interpreted on the force of particular circumstances indicating particular intentions, decisions so founded are more likely to lead to litigation than those which are founded upon adherence to the general rule, that unless there be express words of limitation or something which renders it necessary to give an estate of inheritance the heir at law shall not be disinherited. Whenever a case is decided on circumstances, others who are to judge afterwards may receive a different impression from the same case; whereas the adherence to a general rule is more calculated to avoid uncertainty. I am bound to think that the opinion of my brothers is founded on more solid grounds than mine. They have adhered to the safer side; and I suppose that the parties will be satisfied after having the opinion of seven Judges upon the question. Judgment must now be given for the Defendant.

Per Curiam, Judgment for the Defendant.

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If a sailor execute the articles prescribed by 37 *Geo.* 3. *c.* 73. and serve accordingly, and during the voyage part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages.

Semb. that in such case he is not even liable to a proportionable deduction from his wages in common with the other sailors on account of such plunderage.

THIS was an action of *assumpsit* for work and labour, brought by the Plaintiff, who was a sailor on board a certain ship called the *Mentor*, of which the Defendant was owner, to recover the amount of his wages.

The cause came on to be tried at the Sittings after last *Michaelmas* term, before Mr. Justice *Chambre*, when a verdict was found for the Plaintiff for 14*l.* 10*s.*, subject to the opinion of the Court on the following case:

On the 19th *February* 1803, the Plaintiff shipped himself as a sailor on board the ship *Mentor*, at *Port Maria* in *Jamaica*, for a voyage from *Jamaica* to *London*, and afterwards served on board the ship during the voyage. At the time of his entry he signed the articles prescribed by the statute 37 *Geo.* 3. *c.* 73. The *Mentor* had several pipes of Madeira on board, which were shipped at *Madeira* on the outward-bound voyage, and stowed in the fore part of the ship, and secured in the usual manner by a strong partition of deal boards to prevent the crew from getting to them. When the ship set sail from *Jamaica* on her homeward-bound voyage the partition was secure. In the course of her passage from *Jamaica* to *London* the partition was broken down by some of the crew, but by whom the same was done could not be ascertained. Six of the casks were plugged by some of the crew, but it was not proved that the plaintiff was concerned in the transaction. Upon the landing of the casks plugged there was found a deficiency in their contents to the amount of 162 gallons. The Defendant, the owner, paid all the other men their wages, deducting their proportionable value of the Madeira lost.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover?

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Best Serjt. for the Defendant was called upon to begin. The form of agreement, to be entered into between the master and mariners upon *West India* voyages is expressly prescribed by 37 *Geo.* 3. *c.* 73. *s.* 11. Whatever conditions, therefore, are to be found in the articles contained in the schedule of that act must be binding upon the parties. At the conclusion of the articles it is agreed "that each seaman and mariner who shall well and truly perform the above-mentioned voyage (*provided always* that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to their wages or hire that may become due to him pursuant to this agreement." The right to wages, therefore, is subject to a condition; and if there be any plunderage or embezzlement, the right to wages is forfeited. The terms of the proviso being clear and precise, cannot be done away by construction. Many of the marine laws appear at first repugnant to justice; but they are founded on policy, and have therefore been supported. It appears from *Molloy*, book 2. chap. 3. s. 9. that if goods are embezzled, the master may deduct the amount out of the mariners' wages; for before the mariner can claim his wages out of what the ship hath earned, the ship must be acquitted from the damage that the merchant hath sustained by the negligence or fault of the mariners. It is also said in *Bellamy* v. *Russell*, 2 *Show.* 167. that there is a custom between the master and hired seamen to deduct out of their wages what goods are damnified. And *Gould* J. in *Lane* v. *Cotton*, 1 *Ld. Ray.* 650. referred to the same custom, and cited a record of 24 *Ed.* 3. (*a*), from *Molloy*, book 2. chap. 3. s. 16. It may be thought unjust that every mariner should be subject to bear his share of

(*a*) The judgment in that case was, that every master of a ship is bound to answer for every trespass whatsoever done by his servants in his ship.

the

the embezzlement, though he may not have been privy to it. Yet such was the law before 37 *Geo.* 3., which only carries the same principle further by subjecting the mariners to lose their whole wages in case of embezzlement.

Sir JAMES MANSFIELD Ch. J. Whether the Defendant in this case be entitled to deduct out of the Plaintiff's wages his proportion of the embezzlement, in the same manner as has been done respecting the other seamen, might perhaps afford some question; but nothing has been tendered, and no money paid into court, and we have only to determine whether the Plaintiff be entitled to recover. If, however, the right to a deduction be considered as a question of importance, and the Defendant will pay into court the rest of the Plaintiff's wages, together with the costs of this action, I should have no objection to let this case stand over to next term, in order to consider further the question of deduction; but in that case the Defendant must pay the costs of the argument. As to the act of parliament, nothing can be more unreasonable than the construction set up for the Defendant; the words relied upon are, "that each seaman and mariner who shall well and truly perform the above-mentioned voyage (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to their wages or hire that may become due to him pursuant to this agreement." From these general loose words the Defendant would contend, that if any goods to the amount of 5*s*. be plundered or embezzled by *A*., or any unlawful act committed by *A*., *B*. and every other sailor on board shall lose his whole wages. The words, therefore, must be construed respectively to every sailor who shall plunder, embezzle, or commit an unlawful act. There is no foundation, therefore,

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for a forfeiture of the whole wages, and I suspect that there is as little for a proportionable deduction; for notwithstanding what is said in *Molloy*, if such be the rule of law, it is scarcely possible but that it must have been often mentioned in our books, and as well known as any rule of maritime law, since frequent occasions must have arisen for the application of it.

HEATH J. It is the general marine law of *Europe*, mentioned in the *Consolato del mer*, that if any sailor embezzle goods, the amount shall be deducted from his wages, and his baggage seized for it.

ROOKE J. There is a clause in the articles which shews that the construction now put upon them by the Court is right, for it is "agreed (in a former part) between the masters and officers of the said ship, that whatever apparel, furniture, and stores each of them may receive into their charge, belonging to the said ship, shall be accounted for on her return; and in case any thing shall be lost or damaged, through their carelessness or insufficiency, it shall be made good by such officer or seaman by whose means it may happen to the master and owner of the said ship." This clearly shews that each person is to answer for his own default,

CHAMBRE J. concurring,

Judgment for the Plaintiff (*a*),

Shepherd Serjt. was to have argued on the other side.

(*a*) The Defendant did not desire a further argument upon the question of deduction.

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July 3d.

COOKE *v.* MUNSTONE.

The Plaintiff, having declared upon an agreement to deliver soil or breeze with a count for money had and received, proved that the Defendant having agreed to deliver soil, he, the Plaintiff, paid 2*l.* 5*s.* for earnest, but that the Defendant refused to deliver the soil. Held that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force.

ASSUMPSIT. The first count of the declaration was for not delivering 35 chaldrons of *soil or breeze* according to a special contract between the Defendant and the Plaintiff; to which the money counts were added.

At the trial before Sir *James Mansfield* Ch. J. at the *Guildhall* sittings in this term, it was proved that the Defendant having agreed to supply the Plaintiff with 35 chaldrons of *soil* at seven shillings *per* chaldron, the Plaintiff paid 2*l.* 5*s.* as earnest; that the Plaintiff afterwards sent his barge and demanded the soil, offering at the same time to pay the remainder of the purchase-money as soon as the soil should be put on board, but that the Defendant refused to deliver it on account of a dispute with the Plaintiff respecting the wharf from whence it should be loaded. It appearing, however, that soil and breeze were very different things, it was objected for the Defendant that as the Plaintiff had declared upon a contract for the delivery of soil *or* breeze, and had only proved a contract for the delivery of soil, he must be nonsuited; whereupon the Plaintiff insisted that he was entitled to a verdict for 2*l.* 5*s.* on the count for money had and received. His Lordship thought that as the Plaintiff had proceeded upon a contract which never appeared to have been rescinded by any act or agreement between the parties, but only broken by a refusal of one party to perform it, he was not at liberty to recover the deposit upon the count for money had and received, and accordingly nonsuited the Plaintiff, but gave him liberty to move that the nonsuit should be set aside, and a verdict entered for him, if the Court should be of opinion that he was entitled to it.

Accordingly, a rule *nisi* for that purpose having been obtained,

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Best Serjt. shewed cause. When the contract originally made has been put an end to, the Plaintiff, under the count for money had and received, may recover back any thing paid by virtue of that contract, as appears from *Towers* v. *Barret*, 1 *Term Rep.* 133. but it also appears from that case as well as from *Weston* v. *Downes*, *Dougl.* 23, that if the original contract be still subsisting the Plaintiff cannot recover for money had and received. Now, in the present case, the original contract still subsisted, and the Plaintiff himself considered it as subsisting, and made it the ground of his demand. The case of *Giles* v. *Edwards*, 7 *Term Rep.* 181. is distinguishable from the present, for there the Defendant having undertaken to perform his part of the contract within a limited time, which he neglected to do, the Plaintiff abandoned the contract altogether, as he had a right to do, and brought his action for money had and received. But here the original contract still subsisted, no act to determine it having been done by either party; and the Plaintiff considered it as subsisting, and made it the ground of his demand.

Shepherd Serjt. *contra*. Notwithstanding the Plaintiff's failure upon the first count, on account of the mistake in describing the contract, he is entitled to recover 2*l.* 5*s.* upon the count for money had and received. It was ruled in *Harris* v. *Oke*, *Bull. N. P.* 139. that where the evidence is sufficient to warrant the action on the general count, supposing that no special agreement had been laid in the declaration, the Plaintiff may recover on the general count notwithstanding the special count, whether he attempt to prove it or not. And the rule was recognized in *Payne* v. *Bacomb*, *Dougl.* 651. Now here the Plaintiff had a clear right to recover the 2*l.* 5*s* paid, together with such damage as he has sustained by the non-delivery of the goods; but having failed to prove the contract, he is still entitled to a verdict for 2*l.* 5*s.* unjustly retained

retained by the Defendant. Where an action is brought upon a policy of insurance, and it turns out upon the proof that the voyage never commenced, the Plaintiff is allowed to resort to the count for money had and received to recover the premium. In the present case, the Defendant, by refusing to deliver the goods, put an end to the contract of sale. But in the cases of *Weston* v. *Downes* and *Power* v. *Wells*, *Cowp.* 818. the breach complained of was of something collateral to the contract of sale, *viz.* the warranty; and the thing sold remained in the possession of the buyer. But in *Towers* v. *Barret*, where the contract was put an end to by the return of the chaise according to the terms of the agreement, the Plaintiff was allowed to recover on the general count. And where is the difference between the goods being returned to the seller, and remaining in the seller's possession on account of his refusal to deliver them? In the case of *Giles* v. *Edwards*, the Defendant having neglected to perform his part of the contract, the Court thought that the Plaintiff had a right to abandon it. In *Hunt* v. *Silk*, 5 *East*, 449. where the agreement was, that the Defendant should repair a house and execute a lease to the Plaintiff in 10 days, in consideration of 10*l.* to be paid on the execution thereof, and that the Plaintiff should have immediate possession; the Plaintiff having paid the 10*l.* immediately, and the Defendant having refused to repair within the time, it was held that the Plaintiff could not recover the 10*l.* on a general count. But the ground of the decision was, that the parties could not be put in *statu quo*; the Plaintiff having had possession, and that he ought therefore to have brought his action on the contract. But the present case is like that of a man going into a shop and ordering goods to be sent to him, for which he pays: if, in such case, the shopkeeper were to refuse to send home the goods, might not the buyer recover his money on a general count for money had

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had and received? As to the supposed surprise and want of notice, the Defendant may always apply for a bill of particulars; and if he omit to do so, he is liable to every thing which can be proved applicable to any count in the declaration.

Cur. adv. vult.

On this day the opinion of the Court was pronounced by

Sir JAMES MANSFIELD Ch. J. This was an action for the non-delivery of soil or breeze according to a contract entered into between the parties, and for which money had been paid by way of earnest. There was also a count for money had and received. The framers of the special count in the declaration unfortunately supposed soil and breeze to be the same thing, but the fact proving otherwise, the Plaintiff failed in establishing that count. He then wanted to go into evidence on the count for money had and received, in order to recover back what had been paid by way of earnest. The case appears to me unlike any of those cited. If the Plaintiff were allowed to go into the evidence for which he contends, the consequences might be serious: he seeks to recover not upon the contract on which he has declared, but upon a different contract, and upon a ground which the Defendant could not possibly be prepared to meet. In *Giles* v. *Edwards*, the Plaintiff had no other demand against the Defendant than that for the 10*l.* 10*s.* paid to him, which constitutes the difference between that case and the present. The case of *Towers* v. *Barrett* has no resemblance to the present: the special contract there being at an end, the money paid in respect of that contract was to be returned, and might therefore be recovered under the general count. Indeed the cases in which it has been decided that a Plaintiff may, if he fail on his special contract, resort to a general *indebitatus assumpsit*, are unlike the

the present in this respect, that in truth the special contract is put altogether out of the case as not being properly complied with. But in this instance it would be very strange to allow the Plaintiff to recover on a general *indebitatus assumpsit*, and still leave him his right of recovery for non-performance of the special contract. It is said, however, that he has a right to insist on the special contract and on the general contract at the same time, recovering under the one his damages for non-performance and under the other his money paid; but the cases only warrant a permission to the Plaintiff to resort to his general count when his special contract has failed altogether. I apprehend the rule to be this; where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid or for work and labour done. As in the case of a Plaintiff suing a Defendant as having built a house for him according to agreement; there if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done. In *Buller's Nisi Prius* (*a*) the rule is thus laid down, "if "a man declare upon a special agreement, and likewise "upon a *quantum meruit*, and at the trial prove a "special agreement, but different from what is laid, he "cannot recover on either count; not on the first, be- "cause of the variance, nor on the second, because "there was a special agreement; but if he prove a "special agreement and the work done, but not pursuant "to such agreement, he shall recover upon the *quantum* "*meruit*, for otherwise he would not be able to recover "at all." In *Payne* v. *Bacomb*, I suppose there was a special agreement by the Defendant to pay a share of

(*a*) Ed. 2. p. 139. *Weaver* v. *Burrows*.

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the expences of the suit in the Exchequer, but that agreement had not been strictly pursued by him, and consequently he recovered for the money actually laid out by him to the Defendant's use, on evidence of his connection with the Defendant in that suit, and the obligation of the latter to pay. That case, therefore, proceeds on the ground that there was no special agreement still subsisting and in force between the Plaintiff and Defendant on which the former was entitled to recover. In this case, if we were to allow the Plaintiff to go into the evidence which he offered, it would amount to saying that there was no evidence of a subsisting special agreement, when in truth there was such evidence. The consequence of such a rule would be to introduce the means of practising great surprise upon Defendants.

Per Curiam, Rule discharged.

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(IN THE HOUSE OF LORDS.)

June 25th.

PETER ISAAC THELLUSSON Esquire, GEORGE WOODFORD THELLUSSON Esquire, CHARLES THELLUSSON (the Elder) Esquire, ANN THELLUSSON Widow, The Honourable AUGUSTUS PHIPPS and MARIA his Wife, WILLIAM LUKIN Esquire and ANN his Wife, late ANN THELLUSSON Spinster, and AUGUSTA CHARLOTTE CRESPIGNY Widow, *v.* The Reverend MATTHEW WOODFORD Clerk, EMPEROR JOHN ALEXANDER WOODFORD Esquire, JAMES STANLEY Esquire, WILLIAM THELLUSSON, FREDERICK THELLUSSON, EDMUND THELLUSSON, ALEXANDER THELLUSSON, ARTHUR THELLUSSON, and THOMAS THELLUSSON, Infants, and His Majesty's Attorney-General.

PETER THELLUSSON, Esq., by his will dated the 2d of *April* 1796, after directing his debts to be paid, and bequeathing certain specific and pecuniary legacies, gave, devised, and bequeathed to the Respondents, *Matthew Woodford*, *James Stanley*, and *Emperor*

Devise of real and personal estate to trustees, their heirs, executors, and administrators in trust, to lay out the personalty in land, and during the lives of the testator's sons, *A.*, *B.*, and *C.*, and of his grandson *D.*, the son of *A.*, and of such other sons as *A.* then had or might have, and of such issue as *D.* might have, and of such issue as any other sons of *A.* might have, and of such sons as *B.* and *C.* might have, and of such issue as such sons might have as should be living at the time of the testator's decease, or born in due time afterwards, and during the lives and life of the survivors or survivor, to receive the rents and profits of the real estate devised and to be purchased, and lay out the same, from time to time as they should arise, in land; and, after the death of the survivor of such persons, to divide the whole into three lots, and to convey one to the eldest male lineal descendant of each of his three sons in tail male, with remainders to the second and third, and ever other male lineal descendant, with cross remainders in tail male; remainder to the trustees in fee, upon trust to sell and pay the produce to the king, to be applied to the use of the sinking fund, as should be directed by parliament. This is a good devise at law, and equity will enforce the trusts.

John

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John Alexander Woodford, their heirs and assigns, his capital messuage at *Plaistow* in the county of *Kent*, and the furniture, books, horses, &c. in trust to permit his wife to hold and enjoy them during her widowhood, and gave her other legacies, all which bequests were to be in satisfaction of dower; he then directed that on the death or marriage of his wife, the trustees should sell the estate at *Plaistow* with the furniture and other articles given to her, and that the money produced by the sale should be considered as part of the residue of his personal estate; then, after other devises and legacies, he gave and devised all his manors, messuages, lands, tenements, and hereditaments at *Broadsworth* and certain other places in the county of *York*, and the advowson of the church of *Marr* in that county, and all the lands and hereditaments for the purchase whereof he had entered into any contracts in writing, with the benefit of such contracts, and all other his real estates, unto and to the use of the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns for ever, upon the trusts thereinafter mentioned. And as to the rest, residue, and remainder of his personal estate, he gave and bequeathed the same to the same trustees, their executors, administrators, and assigns, upon trust that they should as soon as conveniently might be after his decease, invest the same in the purchase of freehold estates of inheritance in fee simple, or of copyhold estates of inheritance in *England* (so that the copyhold estates did not exceed one-fourth in proportion of the whole of the premises directed to be purchased), upon the trusts thereinafter mentioned; and he directed that his trustees, their heirs and assigns, should stand seised of the real estates devised to them, and of the freehold and copyhold estates directed to be purchased, "upon trust that they, the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, and the survivors and survivor of them, and the heirs and assigns

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assigns of such survivor, do and shall, from time to time during the natural lives of my sons *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, and of my grandson *John Thellusson*, son of my said son *Peter Isaac Thellusson*, and of such other sons as my said son *Peter Isaac Thellusson* now has or may have, and of such issue as my said grandson *John Thellusson* may have, and of such issue as any other sons of my said son *Peter Isaac Thellusson* may have, and of such sons as my said sons *George Woodford Thellusson* and *Charles Thellusson* may have, and of such issue as such sons may have as shall be living at the time of my decease, or born in due time afterwards, and during the natural lives and life of the survivors and survivor of the several persons aforesaid, collect and receive the rents and profits of the manors or lordships, messuages, lands, tenements, and hereditaments hereinbefore by me devised, and so to be purchased as aforesaid." The testator then directed that his trustees should from time to time invest the money to arise from such rents and profits in such purchases as he had thereinbefore directed to be made with his personal estate, and that they should from time to time collect, receive, lay out, and invest the rents and profits of those estates in the same manner; and he directed his trustees from time to time to cut such timber upon the estates devised and to be purchased as should be fit to be cut, and to sell the same and invest the money arising by such sales in such purchases as were thereinbefore directed to be made with his personal estate, and the rents and profits of the real estates devised and directed to be purchased; and he empowered the trustees to make leases, and generally to act in the management of the trust estates as if the same were their own. He then directed, that after the decease of the several persons, during whose lives the rents and profits of the estates devised and to be purchased were directed to accumulate, an equal partition should be made by his trustees

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trustees of the estates, and that the whole thereof should be divided into three lots of equal value, or as near thereto as possible; and as to the first allotment directed as follows: "I do hereby direct that the premises contained in one of such allotments shall be conveyed to the eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son *Peter Isaac Thellusson* in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son *Peter Isaac Thellusson*, successively in tail male; with remainders in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said sons *George Woodford Thellusson* and *Charles Thellusson*, as tenants in common, in tail male, in the same manner as hereinbefore directed with respect to the eldest and every other male lineal descendant or descendants of my said son *Peter Isaac Thellusson*, with cross remainders between or among such male lineal descendants as aforesaid of my said sons *George Woodford Thellusson* and *Charles Thellusson* in tail male; or, in case there shall be but one such male lineal descendant, then to such one in tail male; with remainder to the use of them the said *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and assigns for ever, upon the trusts and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same." He then directed the estates included in one other of such allotments to be conveyed to the use of the eldest male lineal descendant then living (and who was to have the second choice of such allotments) of his son *George Woodford Thellusson* in tail male, with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants then

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then living of the said *George Woodford Thellusson* successively in tail male; and with similar remainders in equal moities to the eldest and every other male lineal descendant or descendants then living of the said *Peter Isaac Thellusson* and *Charles Thellusson*, as tenants in common in tail male, with similar cross remainders; and with the ultimate remainder in the same manner, to the use of the trustees in fee simple, upon the trusts thereinafter mentioned. He then directed the estates included in the remaining lot to be conveyed to the use of the eldest male lineal descendant then living of his said son *Charles Thellusson* in tail male, with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants then living of his said son *Charles Thellusson* successively in tail male; with remainders in equal moities to the eldest and every other male lineal descendant or descendants then living of the said *Peter Isaac Thellusson* and *George Woodford Thellusson*, as tenants in common in tail male, with similar cross remainders, and with the ultimate remainder in the same manner to the use of the trustees in fee simple, upon the trusts thereinafter mentioned. And he directed that his trustees, their heirs or assigns, should stand and be seised of the estates by him devised and so to be purchased as aforesaid, upon failure of male lineal descendants of his said sons *Peter Isaac Thellusson*, *George Woodford Thellusson*, & *Charles Thellusson* as aforesaid, in trust to sell all the said estates, and to pay the money to arise from the said sales unto His Majesty, his heirs and successors, kings and queens of *England*, to be applied to the use of the sinking fund in such manner as should be directed by act of parliament. He then empowered the trustees to invest money in the stocks or in any government or real securities, until convenient purchases could be found, or a sufficient sum of money be accumulated to make proper purchases, and declared that the interest, dividend, and

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annual produce of the said stocks, funds, and securities should accumulate in the same manner and for the same purposes as the rents and profits of the lands to be purchased as aforesaid were thereinbefore directed to accumulate. The testator then ordered that his trustees should never permit a larger sum than 500*l.* to remain, at any one time, in the hands of any private banker; but that all the monies which they should receive, exceeding that sum, should, when received, be paid into the Bank of *England*, and remain thereuntil laid out as before directed. He then made certain provisions for the appointment of new trustees in the room of any trustee dying or declining to act. And with respect to the advowson of the church of *Marr*, and any other advowson belonging to any other estate that might thereafter be purchased by his trustees, he directed that his trustees should, as the same should respectively become void, present a proper person thereto, who should for that purpose be nominated by one of his said sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of his said three sons respectively, in the order and rotation aforesaid, if he should be capable by law of making such nomination when the church should become vacant, or in due time afterwards; otherwise the eldest male lineal descendant of the next brother was to present to such living; and if, when such livings should become void, or in due time afterwards, no male lineal descendant of any of his said sons should be capable of presenting thereto, he directed his trustees for the time being to present to them. The testator then directed, that from the time when any person should become entitled to any share of the estates, they, and all persons claiming under them, should from thenceforth use the surname of *Thellusson* only; and in default thereof, he directed that the estates should be sold, and that the money arising from the sale of them should be paid to His Majesty,

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Majesty, his heirs and successors, kings and queens of *England*, to the use of the sinking fund, in such manner as should be directed by act of parliament. He then directed that in case he should in his lifetime enter into any contracts for the purchase of any lands, tenements, or hereditaments, and should die before the necessary conveyances were executed, all such contracts should be completed and carried into execution by his said trustees after his death, and that the purchase-monies for them should be paid by them out of his personal estate, and that the deeds and conveyances should be made to them, their heirs, and assigns; and that they should stand and be seised and possessed of all and singular the premises to be conveyed to them, upon, under, and subject to such and the same uses, trusts, limitations, provisoes, and conditions as were by his will declared of the estates thereby directed to be purchased with the aforesaid residue of his estate and effects in manner thereinbefore mentioned. And he appointed his three trustees and his wife executors and executrix of his will.

The said *Peter Thellusson* departed this life on the 21st day of *July*, without altering or revoking his said will. At the time of his decease, his wife and his said three sons by her were living. The said *Peter Isaac Thellusson* was his eldest son and heir at law, and was then of the age of 36 years; the said *George Woodford Thellusson* was his second son, and was then of the age of 33 years; the said *Charles Thellusson* was his third son, and was then of the age of 28 years. His said three daughters were living. *Maria*, the eldest of them, was married to the said *Augustus Phipps*; *Ann* (now the wife of the said *William Lukin* and *Augusta Charlotte* (afterwards the wife, and now the widow of the said *Thomas Champion Crespigny*) were both then unmarried. The said *Peter Isaac Thellusson*, at his father's decease, had issue *John Thellusson*, then of the age of 11 years; *George Thellusson*,

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then of the age of six years; *Henry Thellusson*, then of the age of five years; *Frances Thellusson*, then of the age of seven years; and *Caroline Thellusson*, then of the age of four years. The said *George Woodford Thellusson*, at his father's decease, had issue two daughters, *Mary Ann Thellusson*, then of the age of seven years; and *Georgiana Thellusson*, then of the age of two years. The said *Charles Thellusson* the elder, at his father's decease, had issue one child *Charles Thellusson*, then of the age of five months. At the time of the decease of the said *Peter Thellusson* the wife of the said *Peter Isaac Thellusson*, was with child, and was soon after delivered of twin-born sons called *William* and *Frederick*. The said *James Stanley* renounced the executorship, and declined acting in the said trusts of the will of the said *Peter Thellusson*, and executed an instrument disclaiming the same. The property of the said *Peter Thellusson*, which he made subject to the accumulating trusts of his will, consisted of real estates in *England* of the annual value of 4500*l.*, and of some real estates in the *West Indies*, and of personal property estimated at above 600,000*l.* Some time after the decease of the said *Peter Thellusson*, two suits were instituted in the Court of Chancery respecting his will; one of them was upon a bill filed by his widow and children against the acting trustees and executors of his will, and against the two sons of the said *Peter Isaac Thellusson* born after the testator's decease, and also against the Attorney-General, praying to have the trusts of the will declared void, and the real estate conveyed to the said *Peter Isaac Thellusson* as heir at law of the testator, and the personal estate divided among the Plaintiffs, according to the statute of distribution; the other of the suits was instituted upon a bill filed by the acting trustees and executors of the will of the said *Peter Thellusson* against all the other persons who were parties to the first suit, praying to have the trusts of the will established

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blished and carried into execution, and the necessary directions given for that purpose. Both the original and cross cause came on before Lord *Loughborough* assisted by Sir *Richard Pepper Arden* Master of the Rolls, Mr. Justice *Buller*, and Mr. Justice *Laurence* in *Lincoln's Inn* Hall, on the 5th of *December* 1798, and were heard by his Lordship on that day and several subsequent days. On the 19th of *February* 1802, his Lordship pronounced his decree in both causes, and thereby dismissed the bill in the original cause, so far as it prayed that the limitations and dispositions contained in the will of the said *Peter Thellusson* of and concerning his said real estates, and the general residue of his personal estate, and the rents, issues, and profits of such estates, and concerning the estates directed to be purchased, and the rents and profits thereof, and the trusts thereof, might be declared void: and his Lordship in the cross cause declared that the will ought to be established and the trusts of it performed and carried into execution, and declared the devises and limitations of the estates contained in the will to be good and valid in law, and decreed and gave directions accordingly. The said *Peter Isaac Thellusson*, after the said decree, had three sons born, *viz. Edmund Thellusson*, *Alexander Thellusson*, and *Arthur Thellusson*; and the said *Charles Thellusson* (the elder) also had one son born, *viz. Thomas Thellusson*, all of whom were made parties to the said suit and proceedings; and the said *Ann*, one of the testator's three daughters, after the said decree, intermarried with the said *William Lukin*, who was likewise made a party to the said suit and proceedings.

The appellants apprehended they were aggrieved by the said decree, because it dismissed the bill in the original cause, so far as it prayed that the limitations and dispositions contained in the will of the said *Peter Thellusson*, concerning his real estates, and the general residue of his personal estate, and the estates to be purchased under the

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trusts of his will, and the rents, issues, and profits thereof, might be declared void; and because in the cross cause his Lordship directed that the trusts of the will ought to be performed, and declared the devises and limitations of the estates contained in the will to be good and valid in law; and so far they appealed from it, for the following REASONS:

That the trust, attempted to be created by Mr. *Thellusson's* will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries, which the law prescribes for trusts of that description; but it was neither instituted for those purposes, nor limited within those boundaries.

1st. It was not instituted for the purposes which the law prescribes for those trusts. The nature of it was to create an equitable estate of inheritance, commencing at a future time, without limiting an intermediate equitable estate commensurate with the interval. By the old law, limitations of this kind were illegal. For the purpose of enabling parties to provide for those reasonable occasions of families, which could not be provided for except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills; and afterwards when uses were introduced, the uses raised by them were admitted among those which on account of the fairness and utility of their object, courts of equity thought binding on the consciences of trustees, and the performance of which they would on that ground compel by a *subpœnâ*. Thus the circumstance of their being created for the meritorious purpose of providing for the reasonable occasions of families, was the ground on which the uses raised by these limitations were admitted among those which Courts of Equity would execute; and of course, if they were not created for a purpose of that nature, the ground for the inter-

interference of Courts of Equity does not arise. In the present case there was no such ground: Mr. *Thellusson's* will is morally vicious, as it was a contrivance of a parrent to exclude every one of his issue from the enjoyment even of the produce of his property during almost a century; and it is politically injurious, as during the whole of that period it makes an immense property unproductive, both to individuals and the community at large; and by the time when the accumulation should end, it would have created a fund, the revenue of which would be greater than the civil list, and would therefore give its possessor the means of disturbing the whole œconomy of the country. The probable amount of the accumulated fund, in the events which have happened, was stated in the Appellant's bill, and admitted in the answer, to be 19,000,000*l.*; and in case any of the persons answering the description of heir male, when the period of suspence ends, should be a minor, and his minority should continue 10 years, it would increase the amount of that third to the sum of 10,802,373*l.*; so that if the whole property should center in one person, and that person should have a minority of 10 years, after the end of the period of suspence, (a circumstance by no means improbable, particularly as Mr. *George Woodford Thellusson* has been long married and has no son,) the whole accumulated fund would amount to 32, 407, 120*l.*

2d. The trust was not confined within that boundary which the law prescribes for trusts of that description, (even though it be admitted that all the lives, during which the accumulation was to be carried on, were in existence at the time of Mr. *Thellusson's* decease,) as one circumstance, which materially affects the period of suspence, and which enters into every case in which the suspence of property has been held legal, does not enter into the present case.

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In examining the cases decided on limitations of this kind, it will appear that in every one of them all the lives, during which the period of suspence was directed to be carried on, were evidently the lives of persons immediately connected with or immediately leading to the person in whom, under the trust first limited to take effect at the end of the suspence, the property was to vest. Thus (to instance the two cases in which the accumulation was supposed to have been furthest carried on) in that on Lady *Denison's* will (*a*), Miss *Midgley*, during whose life the property might be in suspence, was the mother of the second son to whom the property was devised; and in *Long* v. *Blackall* (*b*), the testator's posthumous son was immediate ancestor to the heir in whom the property was directed to vest; but in the present case, not one of the first lives has an immediate connection with, or immediately leads to the person benefited. In the sense we are speaking of, the life of any stranger was equally connected with and would equally lead to "the respective male descendant of the testator's son," as the lives assigned by him for the period of suspence. A material difference therefore in a point, considerably influencing the purpose and boundary of the suspence, exists between the present and all the decided cases.

3d. The use made by Mr. *Thellusson* of the rule, allowing a suspence of the absolute ownership of property to be carried on for any number of lives in being, is a fraud on the rule.

It is a maxim of law, which admits of no exception, that nothing shall be effected by indirect means, which cannot be done in a direct manner. Now a possible suspence of property for 25 years was held to be void in Sir *John Lade's* case (*c*); and in the late case of *Proctor*

(*a*) In the Register Book, under the title *Harrison* v. *Harrison*, 21 *July* 1726.

(*b*) 7 *Term Rep.* 100.

(*c*) *Lade* v. *Holford*, *Ambl.* 479. 3 *Burr.* 1416.

v. *The*

v. *The Bishop of Bath & Wells (a)*, the Court of Common Pleas unanimously decided against the legality of a possible suspence of property for 24 years. Where property is suspended through the medium of lives, if the lives be those of persons connected with the ultimate owner, the persons, whose lives form the period of suspence, will generally be the parents of the parties ultimately benefited, and will not therefore be more than one or two lives at the utmost. Now the probable duration of one or two such lives falls short of 21 years; but if an unlimited number of lives be taken, they will reach a century. It is observable, that the probable duration of the lives assumed by Mr. *Thellusson* reaches 70 years. Thus, therefore, if the rule be taken to extend to any number of lives, it will follow, that though, where a number of years directly constitute the term of suspence, property cannot be suspended from vesting absolutely during 25 years, according to the determination in Sir *John Lade's* case, or during 24 years, according to the case of *Proctor* v. *The Bishop of Bath & Wells*, yet by assigning for the period of suspence a number of lives, whose average duration is equal to a given number of years, and thus indirectly making years not lives to constitute the period of suspence, property may be suspended for a whole century; and the present will be cited on future occasions, as a case in point for extending the period of suspence to 70 years. Thus Mr *Thellusson's* will is a fraud on the rule. When, in the Duke of *Norfolk's* case (*b*), Lord *Nottingham* pronounced for the legality of an executory limitation, which kept the absolute ownership of a term of years in suspence for one whole life, and thereby extended the period allowed for the suspence of a term beyond what had been settled for it in the preceding

(*a*) 2 *H. Bl.* 358.

(*b*) 3 *Chan. Ca.* 1. 2 *Chanc. Rep.* 229. 2 *Freeman*, 72, 80. *Pollex*, 104 and Lord *Nottingham's MS. Rep.* in Mr. *Hargrave's* possession.

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case of *Child* v. *Bayley* (*a*), the possibility of the abuse of that extension of executory limitation was strongly pressed upon him; and he answered it in these remarkable words, "It has been urged at the bar, where will you stop, if you do not stop at *Child* and *Bayley's* case? I answer, I will stop every where when any inconvenience appears; no where before. It is not yet resolved, what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to a springing trust of a term: whenever the bounds of reason or convenience are exceeded, the law will quickly be known." The use made by Mr. *Thellusson* of the rule is, both in a private and public view unreasonable and inconvenient: and is still more objectionable, as by carrying on indirectly an accumulation for 70 years, which directly could not be carried on for one-third of such a number of years, it is a fraud on the rule itself. Thus, therefore, the time pointed out by Lord *Nottingham* is come; and it is necessary that it should be known, that the rule is to be understood with this limitation, that whenever, from the number or quality of the lives chosen, it is evident that accumulation, and not a family purpose, is the object of the trust, the bounds of the reason and convenience of the rule are exceeded, and a fraud has been practised on the rule. It is objected to this conclusion, that any enquiry into the reasonableness, convenience, or fairness of the use made of the rule must lead to uncertainty, and to an exercise of discretion which the Bench has always disclaimed; but this does not follow. As much uncertainty and as great an exercise of discretion attends all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness of the use made of the rule in question. A contract may be objectionable for its unreasonableness

(*a*) *Cro. Jac.* 459. 1 *Rol. Ab.* 612. *Palmer* 48 333.

and

and unfairness, without being objectionable on the ground of either to such a degree as will induce a Court of Equity to rescind it: but still there is a degree in which Equity will interfere. "To set aside a conveyance, there must," Lord *Thurlow* said in the case of *Gwynne* v. *Heaton (a)*, "be an inequality so strong, gross, and complete, that it must be impossible to state it to a man of common sense without producing an exclamation of the inequality of it." So in respect to the rule in question, it may be much abused, without a Court's being justified in taking notice of the abuse; but when the abuse is so strong, gross, and complete, that every man of common sense, to whom it is stated, must exclaim against it, the case supposed by Lord *Nottingham* is come, and Equity will interfere to set it aside. That the rule has been strongly, grossly, and completely abused in the present case, appears not to be doubted.

4th. The trust is not limited within those boundaries which the law requires for trusts of this description, because the will attempts to protract the accumulation during the lives of persons unborn at the time of the testator's decease, the testator having selected for that purpose the lives of such persons as might not be born till within due time after his decease; and the persons thus described cannot be considered as persons actually born in his lifetime.

It is true that for some purposes as at the common law, to take by descent and by 10 & 11 *William* 3. *c.* 16. to take by way of remainder a child, who is *in ventre sa mere* when the estate designed for him would devolve upon him if he were born, becomes entitled to it after he is born, and may then enter upon it and divest it from the first taker. But his title to enter upon the estate after his birth is not a consequence of his supposed existence during

(a) 1 *Brown. Chanc. Rep.* 1.

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the time he was *in ventre sa mere*, but because by his taking by descent, the law, at the instant of his birth, invests him, though a posthumous child, with the character of heir, and consequently with all the rights of heirship; and because, when he claims by way of remainder, it is expressly provided by 10 & 11 *Wil.* 3. *c.* 16. that the remainder shall vest in him upon his birth. If the law considered him to exist before his birth, the freehold, during the time of his being *in ventre sa mere*, would be vested in him in the eye of the law, and for the purposes of law; but that clearly is not the case; for while he is *in ventre sa mere* the law vests the freehold in the intermediate taker, as heir, with every right and burthen of heirship, so that after the birth of the nearer heir he even retains the profits of the estates against him. That class of lives, therefore, which is now the subject of observation, neither had nor could have an existence, either in fact or in law, in the lifetime of Mr. *Thellusson*. It follows, that by the admission of them into the term of suspence, the boundary, prescribed by law for the suspence of real property, has been exceeded. No cases, the subject of which is real property, can be mentioned in which a child *in ventre sa mere* has been held to be in existence for any purpose, except to limit the estate of the first devisee, or for the actual benefit of the child himself, being the substituted devisee. In *Bennett* v. *Honeywood* (*a*), Lord *Bathurst* declared that the Court had never construed a child *in ventre sa mere* to be actually born at the time of the death of the testator, except in the case of a devise to the children. Cases upon trusts of personal estates are not applicable to cases of the present description arising on devises of real estates; for those rules of law, respecting real estates, which require that an estate of freehold should be actually vested in some person, and therefore

(*a*) *Ambl.* 708.

deny

deny a legal existence to a child *in ventre sa mere*, even for his own benefit, are in no wise applicable to trusts of personal estate. The case of *Long* v. *Blackall* is the only case where the lawfulness of making a child *in ventre sa mere* a life, for the purpose of suspence, appears to have been admitted; but that was a case of personal estate. Now as there is no law which denies a legal existence to a child *in ventre sa mere*, where personal estate is concerned, it seems (especially where, as in *Long* v. *Blackall*, it gives effect to a provision made by a parent for a child) that there is strong ground to contend, that a child *in ventre sa mere* shall, in the eye of the law be supposed to exist for his own benefit, and that there should be a strong disposition in the Courts to favour such an argument; but in the present case, from the impossibility of supposing the freehold to be in the child while *in ventre sa mere*, the argument is wholly inadmissible. Admitting, however, that the lives in question were, for some purposes of law, in existence in the lifetime of Mr. *Thellusson*, they certainly were not in existence for the use he made of them. In the cases where the nine months have been mentioned, as a period allowed for protracting the suspence of property, it is generally added that the nine months were allowed for the sake of the posthumous child intended to be benefited by the protraction; but a single instance cannot be produced, where the nine months have been added for any other purpose; and perhaps an instance cannot be brought, where the Courts have had occasion to mention the nine months without adding at the same time, that they were allowed merely for the benefit of the posthumous child. Then how does the argument stand? A posthumous child is in fact unborn at the testator's decease; the law allows that, when after his birth he answers the character of heir taking by descent, and also in some cases especially provided for by act of parliament, his being *in ventre sa mere* shall not deprive

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deprive him of an estate, to which, if actually born at the time of its devolution, he would have been entitled. To argue from this that for all purposes, and particularly for purposes which, as in the present case, operate to their prejudice, posthumous children shall, in the supposition of law, be thought in existence, is unjustifiable.

5th. In other respects, the suspence evidently extends beyond the lives of persons in being at the testator's decease.

The classes of lives are described by the testator in the following words: 1st. "During the natural lives of my sons *Peter Isaac Thellusson*, *George Woadford Thellusson*, and *Charles Thellusson*. 2d. And of my grandson *John Thellusson*, son of my said son *Peter Isaac Thellusson*. 3d. And of such other sons as my said son *Peter Isaac Thellusson* now has or may have. 4th. And of such issue as my grandson *John Thellusson*, son of my said son *Peter Isaac Thellusson*, may have. 5th. And of such issue as any other sons of my said son *Peter Isaac Thellusson* may have. 6th. And of such sons as my said sons *George Woodford Thellusson* and *Charles Thellusson* may have. 7th. And of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards."

The question is, Whether all the lives mentioned in this part of the will must necessarily have been in existence in the lifetime of the testator, or whether some of them might come into existence after his decease? On the last supposition the devise is evidently too remote. Now unless the words in the 3d, 4th, 5th, 6th, and 7th members of the sentence are restrained by the qualifying words, "as shall be living at the time of my decease, or born in due time afterwards," which are introduced at the end of the last member of the sentence, they manifestly extend to persons who might be born after Mr. *Thellusson's* decease. But the qualifying words cannot, upon any principle either of grammatical or legal construction, apply to them. In common sense, by every rule of grammar, and according

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to every principle and precedent of legal construction, words of relation are always exclusively referred to the next immediate antecedent, unless such exclusive reference embarrasses the sentence. But in the present case, the sentence will not only not be embarrassed by confining the reference in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree, by extending the reference to any prior member of it. It will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself; every member will have its word of relation, and an antecedent word to which it explicitly refers; but it will be embarrassed in an extreme degree by extending the reference to the prior members of the sentence. The restrictive words cannot be applied to the first or second members of the sentence, without making them absolute nonsense; this alone leads to the conclusion, that they were not to be referred to the other members of the sentence, especially as without them, and standing by itself, each of those members is perfect. If the restrictive words are referred to the third and fourth members of the sentence, one half of them must be omitted, or the reference will make them perfect nonsense; for the words "born in due time afterwards" can never be referred to the words "now has;" as it is impossible that a testator, speaking of sons living, when his will is made, can describe them as sons born in due time after his decease. The fifth member of the sentence is complete without the restrictive words: they do not, however, make nonsense of it; but then they leave it altogether open, to the full force of the objection; as by every rule of construction the restrictive words, if they are applied to that member of the sentence, must be referred to the "sons" mentioned in it, and not to the "issue of the sons." It is impossible to suppose

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suppose that a testator of the age of 64, at the time he made his will, should have had it in his contemplation to provide for the event of there being in existence, at the time of his decease, a son of an unborn grandson of his body; yet to that supposition the reference of the restrictive words, to the word "issue" in the fifth member of the sentence, necessarily leads. Now if they are referred to the word "sons," the word "issue" is left unqualified; and then among the lives, during which the period of suspence is to be carried on, must be reckoned all the issue of the sons, whenever such issue is born. It is apprehended, that this is the only admissible construction, and that the legal boundary of suspence is therefore exceeded.

6th. Finally, the testator exceeded the bounds prescribed by law for the suspence of property, in the clause by which he directed the property to be invested in the funds till purchases could be found.

The proper and only legal mode of declaring the trusts of those investments, for the purpose probably in the contemplation of the testator, was directing the dividends and annual produce of them to be applied to the persons and in the manner in which, if lands were actually purchased and settled, conformable to the trusts, the rents of them would be applicable. This the testator did not, but on the contrary, expressly directed the accumulation to be carried on till the purchases were actually made; so that the beneficial ownership of the property would be suspended, not only till all the lives, during which it was directed to be accumulated, should expire, but during such further period of time as might elapse between the decease of the last surviving life and the completion of the last purchase.

J. MANSFIELD.
S. ROMILLY.
C. BUTLER.

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The Respondents, *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, prayed that the decree might be affirmed, for the following REASONS:

The validity of the disposition made by the late Mr. *Thellusson* of that part of his real and personal estate, which was the subject of the appeal, depends solely on the question, whether the period, during which he directed the enjoyment of the property to be suspended, and the accumulation of the rents and profits of it to be carried on and continued, exceeds the bounds allowed and established by the laws of *England* for the suspension of the beneficial dominion of property and the complete, and absolute power of disposing thereof. As the law stood at the time of Mr. *Thellusson's* decease, it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued during the lives of persons in being, and the life of the survivor of them, and for 21 years after the survivor's decease, and a further number of months equal to the duration of pregnancy. Now the term of suspence and accumulation directed by Mr. *Thellusson* is confined to the lives of persons in being at the time of his decease, or born in due time afterwards, *i. e. in ventre sa mere* at his decease, and the life of the longest liver of them; and thus, being confined to lives in existence at the death of the testator, or to come into existence within the period of gestation immediately after his death, without any reference to any further number of years, it not only does not exceed, but it falls short of that boundary to which, according to established rules, it might have been lawfully protracted.

And the Respondents, *Edmund Thellusson*, *Alexander Thellusson*, *Arthur Thellusson*, and *Thomas Thellusson*, being infants, submitted their rights and interests under the said will, so far as they were or might be affected by the said appeal, to the consideration of their Lordships; and in case their Lordships should be of opinion that the limita-

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tions in the said will might be modified and altered in such manner as to give effect to the general intent of the testator, the said Respondents humbly submitted that they might eventually be entitled to the whole of or to a share in the said testator's devised estates.

A. PIGOTT, for the Devisees in Trust.
R. RICHARDS.
C. THOMSON.

The Respondents, *William Thellusson* and *Frederick Thellusson*, being infants, submitted their rights and interests under the said will, so far as they were or might be affected by the said appeal, to the consideration of their Lordships; and, in case their Lordships should be of opinion that the limitations in the said will might be modified and altered in such a manner as to give effect to the general intent of the testator, the said Respondents humbly submitted that they might eventually be entitled to the whole of or to a share in the said testator's devised estates.

T. M. SUTTON.
S. C. COX.

The Respondent, His Majesty's Attorney-General, trusted that the said decree might be affirmed, for the following, among other, REASONS:

1. The only question is, Whether the testator has transgressed any of those rules of law or equity which were sanctioned and established by decisions of Courts of Justice at the time when he made his will? That an executory devise is good, which is to take effect in possession after the determination of any number of lives of persons actually born, and after the death of a child *in ventre sa mere* (allowing for the period of gestation of such child), is a rule which cannot now be shaken, without shaking the foundation of the law. In the present case, on the determination of only nine lives, there will be a vested estate in possession, and the vesting therefore of the property

property in question is not postponed for a longer period than the law allows. There is nothing in this case which in technical language tends to a perpetuity. An estate may be limited to one for life, remainder to another for life, remainder to a third, and so on to twenty persons for life; nay a settlement has, by the directions of a Court of Equity, been made, limiting an estate to fifty persons in being for their successive lives, and no inconvenience has ever been apprehended from such limitations. The rule has been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives, that it does not signify how great the number of lives is, for it is but for the life of the survivor, and therefore but for the life of one person. A man may appoint 100 or 1000 trustees, and that the survivor shall appoint a life estate that would be within the line of a perpetuity. The Judges have never been aware of the difference between one life and twenty lives. Every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which cannot be rendered unalienable beyond the time at which the remainderman, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The Court has no criterion to judge of the inconvenience arising from restraining the alienation of property by executory devise, except by analogy to the restraint which the common law allows to be put on the alienation of real property *(a)*.

2. The notion that an executory devise is good or bad, according to the number of lives after which it is to take effect, never occurred to any Judge or Lawyer until the present case; nor can such a notion be supported, unless it shall be determined that a Judge is to decide

(a) Love v. *Windham, Sid.* 450. *Humberston* v. *Humberston*, 1 *P. Wms.* 332. *Scutterwood* v. *Edge, Salk.* 229. 2 *Br. Ch. Cas.* 30. 3 *Ch. Cas.* 29.

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upon the particular circumstances of each particular case, and that he is not to look for a general rule, but for particular instances in which the general rule has been acted upon. In the Duke of *Norfolk's* case, Lord *Nottingham*, so far from deciding upon the principle that executory devises must depend upon the rule of convenience or inconvenience, has positively declared that he intended to confine executory devises and trusts within the limits of estates tail, and without any exception he gave the same limitation to executory devises and trusts; the extent of the property, the cruelty or kindness of the disposition, cannot be permitted to operate upon the decision of a Court of Justice. The intention of the testator in this case is clear and certain; it is consistent with the rule of law; that intention cannot be controuled by ideas of its fitness or unfitness, of its policy or impolicy; the intention of the testator is consistent with the settled rules of law at the time when his will was made, and therefore the will must be established.

3. The objection that the doctrine of executory devises is not applicable to a trust of accumulation is totally unfounded; the attention of a Court of Equity has been frequently directed to a trust of accumulation. There are many cases in which accumulation has been directed by the Court, because the testator has expressly directed it *(a)*; others in which it has been directed, because the will contained indications of such an intention *(b)*; and others, in which the attention of the Court has been so particularly called to the legality of the accumulation directed, as to fix the period beyond which such accumulation was not to extend; the objection has never been before made, even in argument, except in the case of Lady *Dennison's* will, when it was raised in argument but without success *(c)*; it has always been considered in

(a) *Hopkins* v. *Hopkins, Cas. temp. Talbot*, 44.

(b) *Gibson* v. *Ld. Mumford*, 1 *Ves.* 485.

(c) *Harrison* v. *Harrison*, 21st *July* 1786.

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the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time during which the law allows a testator to render his estate unalienable. If that is not the period during which the trust of accumulation is to continue, what other period is to be substituted? May the accumulation be permitted for one life, or for three lives, or for twenty? Different Judges may entertain very different opinions upon the subject; one good life may be more than equal to fifty bad lives. The rule, therefore, which can neither be extended nor contracted, is laid down by the law, and is, that accumulation may go on during that period of time during which the law permits the estate to remain unalienable; the law does not regard the quantity of property accumulated, but anxiously provides that, when accumulated, it shall not remain unalienable beyond a period clearly marked out and defined.

4. With respect to the objection, that a child *in ventre sa mere* is not a life in being for the purpose of suspending the absolute vesting of an estate, it is clear that such children are considered by law as in being, for a variety of purposes: they are considered as in being at the death of an intestate, in order to be entitled to take under the statute for distribution of intestate estates; they are capable of taking by descent estates in fee simple or in fee tail. It is admitted that they are to be considered as in being for such a purpose as the present. The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words which some reporters of decisions have ascribed to Judges when delivering their opinions upon claims made by such children; but these words, if they are used in those cases, by no means negative the proposition, that such children are in being for all purposes; there is no reason for confining the rule, they are entitled to all the privileges of all persons; and it is reasonable

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that they should be the means of conferring privileges upon other persons; but the law considers such children as in being in cases in which they may be prejudiced; they may be vouched in a recovery (*a*), though such voucher is for the purpose of making them answerable over in value; they may be executors. Such a child was considered in being for such a purpose as the present, in *Long* v. *Blackall*, which is a complete decision on the very point. Supposing that the case of *Long* v. *Blackall* has not settled the point, the words in the testator's will "born in due time afterwards" afford a principle of construction sufficient to maintain the point. Those words must be considered in construction of law as describing that period during which persons may come *in esse*, for whose lives according to law the accumulation may go forward.

5. With respect to the objection, that the words of restriction in the will "as shall be living at the time of my decease or born in due time afterwards" are, according to just construction, to be confined to the last class of persons during whose lives the accumulation is to be, and cannot, according to the rules of construction, be carried back to any of the preceding classes. It is submitted that the clause of restriction cannot be disconnected from all the descriptions of persons whose lives are specified; it is one sentence, and the qualification is applicable and must be applied to the whole. Strict grammatical construction is not the rule which governs in wills, if the intention of the testator require a different construction: and this sort of construction applies to all cases whether the testamentary disposition be contrary to, or consistent with, what may be considered as worthy of favour. The intention of the testator, if it is not inconsistent with the rules of law, is alone to be attended to. It is impossible to read the clause in question, with a view to discover the

(*a*) *Co. Lit.* 390. *a.*

meaning

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meaning of the testator, without being convinced that the testator meant to apply the restrictive words to all the members of the clause that should require such restriction; the adding the restriction, after the enumeration of the last class of persons, was not because it was intended to apply to that only, but in order to avoid the frequent repetition of it.

6. As to the objection that the testator has exceeded the bounds prescribed by law for the suspence of property, in the clause by which he directs the property to be invested in the funds until purchases can be found, if such objection is now to be repeated, the answer is, that such is the case in every will where there is a direction to lay out an accumulating fund of principle and interest in lands. It is always in this way that, until the purchase can be made, the money is to be accumulated, where an accumulating fund is to be made the ground of purchase; the interest and dividends, until the purchase is made, are never directed to be paid to the person who would be entitled to the rents and profits of the lands to be purchased.

EDW. LAW.
SP. PERCIVAL.
J. CAMPBELL.

This case was argued on several days at the bar of the House by *Mansfield* and *Romilly* for the Appellants, and the Attorney-General (*Percival*), the Solicitor-General (*Sutton*), *Pigott*, *Richards*, *Alexander*, and *Cox*, for the Respondents. After the argument, the following questions were proposed to the Judges on the motion of the Lord Chancellor (*a*).

1st. A testator by his will, being seised in fee of the real estate therein mentioned, made the following devise: —I give and devise all my manors, messuages, tenements,

(*a*) Lord *Eldon*.

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and hereditaments, at *Brodsworth* in the county of *York*, after the death of my sons *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, and of my grandson *John Thellusson*, son of my son *Peter Isaac Thellusson*, and of such other sons as my said son *Peter Isaac Thellusson* may have, and of such sons as my said sons *George Woodford Thellusson* and *Charles Thellusson* may have, and of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards, and, after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal descendant of my son *Peter Isaac Thellusson* and his heirs for ever.—At the time of the testator's death there were seven persons actually born answering the description mentioned in the testator's will, and there were two *in ventre sa mere* answering the description, if children *in ventre sa mere* do answer that description; all the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons, there being living one male lineal descendant of the testator's son *Peter Isaac Thellusson*, and one only: Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments, at *Brodsworth*?

2d. If, at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere*, Would such lineal descendant when actually born be so entitled?

On this day the unanimous opinion of the Judges was pronounced by the Lord Chief Baron MACDONALD, who spoke to the following effect:—

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The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law, for three reasons. First, Because so great a number of lives cannot be taken as in the present instance to protract the time during which the vesting is suspended, and consequently the power of alienation suspended. Secondly, That the testator has added to the lives of persons who should be born at the time of his death the lives of persons who might not be born. Thirdly, That, after enumerating different classes of lives during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at my decease, or born in due time afterwards," and that as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grand children and great-grand children, and their issue, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, *viz.* the number of lives taken, which in the present instance is nine, I apprehend that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered by the ablest Judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life, and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by *Twisden* in *Love* v. *Wyndham*, 1 *Mod.* 50. twenty years before the determination

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mination of the Duke of *Norfolk's* case, who says that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression, he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord *Nottingham* as to the time within which the contingency must happen, he thus expresses himself: "If a term be devised, or the trust of "a term limited, to one for life with twenty remainders "for life successively, and all the persons are in exist- "ence and alive at the time of the limitation of their "estates, these, though they look like a possibility upon "a possibility, are all good, because they produce no in- "convenience; they wear out in a little time." With an easy interpretation, we find from Lord *Nottingham* what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed. When he declares that he will stop where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean, where Judges arbitrarily imagine they perceive an inconvenience, for he has himself stated where inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal limitations. I understand him to mean, that wherever Courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same but no greater latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted. In *Scatterwood* v. *Edge*, 1 *Salk.* 229. the Court held that an executory

executory estate, to arise within the compass of a reasonable time, is good, as 20 or 30 years; so is the compass of a life or lives, for let the lives be never so many, there must be a survivor, and so it is but the length of that life. In *Humberston* v. *Humberston*, 1 *P. Wms.* 332. where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord *Cowper* restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those who were living (at the death of the testator), and estates tail to those who were unborn, considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His Lordship was in the situation alluded to by Lord *Nottingham*, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded, the excess was cut off, and the devise confirmed within those limits. Lord *Hardwicke* repeats the same doctrine in *Sheffield* v. *Lord Orrery*, 3 *Atk.* 282. using the words life or lives without any restriction as to number. Many other cases might be cited to the like effect, but I shall only add what is laid down in two very modern cases. In *Gurnall* v. *Wood* (*a*), Lord Chief Justice *Willes* speaks of a life or lives without any qualification; and Lord *Thurlow* in *Robinson* v. *Hardcastle* (*b*), says that a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate. It appears then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered, that when such cases occur, they will, according to their respective circumstances,

(*a*) *Willes*, 211. (*b*) 2 *Bro. Ch. Cas.* 30.

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stances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly. But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to the person in whom the property was first to vest when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families which in almost all instances look at the existing members of the family of the testator and its connexions. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle that renders such an ingredient necessary. The principle is, the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with or immediately leading to that person in whom the property is first to vest, terms to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances, which I apprehend looks merely to duration of time. This could not be the opinion of Lord *Thurlow* in *Robinson* v. *Hardcastle*, nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice *Willes* (*Rep.* 215.) with his usual accuracy and perspicuity: "Executory devises have not been considered as mere possibilities, but as certain interests and estates, and have been resembled to contingent remainders

mainders in all other respects; only they have been put under some restraints to prevent perpetuities. As at first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child *in ventre sa mere* at the time of the father's death, because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience, and the rule has in many instances been extended to 21 years after the death of a person in being, as in that case likewise there is no danger of a perpetuity." Comparing what the testator has done in the present case with what is above cited, it will appear that he has not postponed the vesting even so long as he might have done. The second objection which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease, those of persons not then born. It becomes, therefore, necessary to discover in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation; what is to be intended by these words in this will must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born during whose lives the trust might legally continue, or, in other words, whom the law would consider as born at the time of his decease. Now these could only be such children of the several persons named as their respective mothers were *ensient* with at the time of his death; or, he may have meant to use the word "due" as denoting that period of time which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time during which the presentation to the advowson of *Marr* might be suspended without

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without incurring a lapse. That a child *in ventre sa mere* was considered as in existence, so as to be capable of taking by executory devise, was maintained by *Powell* in the case of *Loddington* v. *Kime*, 1 *Ld. Raym.* 207. upon this ground, that the space of time between the death of the father and birth of the posthumous son was so short that no inconvenience could ensue. So in *Northey* v. *Strange*, 1 *P. Wms.* 340. Sir *J. Trevor* held that by a devise to children and grandchildren an unborn grandchild should take. Two years after, Lord *Macclesfield* in *Burdett* v. *Hopegood*, 1 *P. Wms.* 486. held that where a devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take as being left at the testator's death. In *Wallis* v. *Hodgson*, 2 *Atk.* 117. Lord *Hardwicke* held that a posthumous child was entitled under the statute of distributions, and his reason deserves notice. "The principal reason (says he) that I go upon is, that the Plaintiff was *in ventre sa mere* at the time of her brother's death, and consequently a person *in rerum naturâ*; so that by the rules of the common and civil law she was, to all intents and purposes, a child as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living, *Beale* v. *Beale*, 1 *P. Wms.* 244. and so in a variety of other reports. In *Basset* v. *Basset*, 3 *Atk.* 203. Ld. *Hardwicke* decreed rents and profits which had accrued at a rent-day preceding his birth to a posthumous child, and since the stat. of 10 & 11 *W.* 3. *c.* 16. such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe* v. *Quarterley*, 1 *Term Rep.* 630. the devise was to *Hester Read* for life, daughter of *Walter Read*, and to the heirs of her body; and for default of such issue, to such child as the wife of *Walter Read* is now

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ensient with, and the heirs of the body of such child, then to the right heirs of *Walter Read* and *Mary* his wife. It was contended that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the Court said, that since the stat. of King *William*, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver* v. *Wickett*, 1 *Wils.* 105. the devise was to the wife for life, then to the child, with which she was supposed to be *ensient*, in fee, provided that if such child should die before 21 leaving no issue, the reversion should go to other persons named. The Court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise. In *Doe* v. *Lancashire*, 5 *Term Rep.* 49, the Court of King's Bench has held that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe* v. *Clarke*, 2 *H. Bl.* 399. Ld. Chief Justice *Eyre* holds that independent of intention an infant *in ventre sa mere*, by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease; and he professes not to accede to the distinction between the cases in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children who happened to have been actually born at the time of his death. The most recent case is that of *Long* v. *Blackall;* there the Court of King's Bench had no doubt that a devise to a child *in ventre sa mere* in the first instance was good, and a limitation over was good also on the contingency of there being no issue male or descendant of issue male living at the death of such posthumous child. It seems then, that if estates for

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for life had been given to the several *cestuis qui vie* in this will, and after their deaths to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch as the circulation of real property is no more fettered in the one case than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children *in ventre matris* at the death of the testator shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection I conceive will be removed by the application of the usual rules in construing wills, to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was to prevent alienation as long as by law he could; if then it is to be supposed that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons which immediately preceded this 7th class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea

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of overlooking the plain intent which is disclosed in the context, namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage; if words admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted. I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands, or may hereafter stand, or as to the motives which may have influenced this testator, nor his neglect of those considerations by which I or any other individual may or ought to have been moved; that would be to suppose that such topics can in any way affect the judicial mind. For these imperfect reasons, I concur with the rest of the Judges in offering this answer to your Lordships' first question.

With respect to your Lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled that an estate may be limited in the first instance to a child unborn, and I apprehend to the first and other sons in fee as purchasers. The case of *Long* v. *Blackall*, 7 *T. R.* 100, seems to have decided that an infant *in ventre matris* is a life in being. The established length of time during which the vesting may be suspended is during life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termination of the suspension, and if such children are considered by the construction of the stat. of 10 & 11 *W.* 3. *c.* 16. as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases where it has been allowed at the commencement, and particulary in *Long* v. *Blackall*,

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it must have been obvious to the Court that it might be wanting at the termination, yet that was never made an objection. In *Gulliver* v. *Wickett*, the child which was supposed to be *in ventre sa mere* might have married and died before 21, and have left his wife *ensient*; in that case a double allowance would have been required, yet that possibility was never made an objection, although it was obvious. In *Long* v. *Blackall*, according to the printed report, the precise point was not gone into. But it is plain that the attention of the Court must have been drawn to it, for the learned Judge (*a*), who argued that case in support of the devise, expressly stated "that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the heir for life may die leaving his wife *ensient*, and the only difference is that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable that it might possibly occur at both ends. Every reason then for allowing the period of gestation in the one case, seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But natural justice, in several cases, having considered children *in ventre sa mere* as living at the death of the father, it should seem that no distinction can properly be made, but that in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity.

After the opinion of the Judges had been delivered,

The LORD CHANCELLOR addressed the House as follows. The learned Judges having giving their opinion

(*a*) Mr. Justice *Chambre*, then at the bar.

upon

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upon the points of law referred to them, there is nothing remaining for the consideration of the House except one question, which could not be referred to the Judges. This cause was decided in the Court of Chancery by Lord *Rosselyn*, with the assistance of Lord *Alvanley*, Mr. Justice *Buller*, and Mr. Justice *Lawrence*; and I believe that I speak in the hearing of those who know that the late Lord *Kenyon* could hardly be brought to consider these questions as fit to be argued, thinking it dangerous, after what had been settled with respect to executory devises, to allow so much consideration to be given to them. This opinion upon the subject was never doubted. In the case of *Robinson* v. *Hardcastle* (*a*) it is laid down as unquestionably competent to a testator to give the power of appointing a life estate to the survivor of a thousand persons, to begin at the decease of such survivor. Your Lordships therefore have the concurrent testimony of all the learned persons to whom I have alluded, as well as of the learned Judges whose unanimous opinion has been delivered this day upon this great case: not great indeed on account of the questions which it involves, or of any thing of which as Judges we can take notice, since the decision must be the same whether the property in question be one hundred pounds or seven hundred thousand pounds *per annum*. If it were allowable to entertain a wish upon the subject, perhaps we might all concur: but we are only to consider whether there be any thing in this will to render it illegal. When it was said, that an attempt to tie up property for nine lives was illegal, I thought that such a proposition could never be supported: for the length of time does not depend upon the number, but on the nature of the lives. If we are to argue on probabilities, two lives may last longer than nine or ten. If in the year 1796 estates had been devised to accumu-

(*a*) 2 *Bro. Ch. Ca.* 30.

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late during the lives of so many of the members of this House as have died since that time, it might have been argued that the property was tied up for 20 or 30 lives: and yet this number of lives has worn out in a very short period. The question therefore cannot turn upon the magnitude of the property, or the number of the lives. The question is, whether there be any rule of law which prescribes a period for which property may be unalienable. Now the language of all the cases is this, that property may be so limited as to make it unalienable during any number of lives. I know no other rule but that. Such being the law, there is another question arising upon this will which is a pure question of equity, *viz.* Whether a testator can direct the rents and profits to be accumulated during that period for which he may so make the property unalienable? That he may do so I take to be most clear. In truth I speak in the hearing of those who will assent to me when I say, that if the testator had given the residue of his personal estate to such person as should be the eldest male descendant of *Peter Isaac Thellusson* at the death of the survivor of all the lives without more, that simple bequest would direct an accumulation until it should be seen what person answered the description of that male descendant; and the effect of the common rules of law would have supplied the rest. The course of proceeding would have been to inquire whether the executory devise of the personal estate to such future individual were good: and if it were good, then wherever the residue was given, the interest and profits would go likewise. There can be no more objection to such person taking the interest than the capital itself. Suppose the nine persons during whose lives this property is tied up had been lunatics: the interest and profits would be accumulated without any direction. Nor does the policy of the law, which respects perpetuities, apply to the case of accumulation. The rents and profits are not locked up, but

but are constantly invested, and a fund is kept in a course of constant circulation. If then the fruits of the property are kept in constant circulation while the property is limited, what objection can there be to accumulation? I remember in the case of Mrs. *Buckley's* will, where the testatrix had given property to such second son of her infant daughter as should first attain the age of 21, Lord *Kenyon*, then Master of the Rolls, directed the whole profits to accumulate during that period, taking the rule to be quite clear, that so long as the property was unalienable, he might direct the rents and profits to accumulate. And I speak with great sincerity when I say, that I never could entertain the least doubt upon the subject. If we lay aside all the cases which have occurred since the act of the 39 and 40 *Geo.* 3. *c.* 98. there is nothing to impeach it. That act was rather a matter of surprise upon me; and perhaps it is not one of the wisest legislative measures. But it must be remembered that it expressly alters what it takes to have been the former law, and confines the power of accumulation to 21 years: but if your Lordships were to exercise the power of accumulation in all the cases allowed by the act, the accumulation would be enormous. It did not occur to those who framed the act of the 39 and 40 *Geo.* 3. that if this very will had been made subsequent to the passing of that act, the accumulations directed by this will would have gone on for 21 years. The Court of Chancery has decided that if a person makes such a disposition of his property that it may be unalienable for a longer period than is allowed by the act such disposition is only void for so much as exceeds the term of 21 years, leaving it good for the rest of the term *(a)*. The only points which have ever appeared to me to bear an argument, have been those upon the critical meaning of the words "as shall be living at the

(a) Griffiths v. *Vere*, 9 *Ves. jun.* 127.

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"time of my decease," and the words "or born in "due time afterwards," which follow the description of the persons during whose lives the property is tied up. If from any disinclination to give effect to this will, your Lordships were to construe the former words as referring to the last description of persons only, that disinclination would be gratified at the expence of overturning all the rules of construction which have been settled for ages; and even if your Lordships should feel inclined to give any relief by legislative interference (which would be very bold), I am quite sure that you will not be so bold as to give a wrong judgment in point of law. With respect to the other point, *viz.* the words "born in due time afterwards," I observe that, according to the printed report, one of the Judges *(a)* held that these words must refer to a child *in ventre sa mere;* and the others, that they amounted to a declaration of the testator's will that the property should be unalienable and accumulate during the lives of all the persons born or unborn, whom the law authorised him to take as lives. In my opinion either of these constructions may be taken to be the true meaning agreeably to the rules of law; but I must add, that according to the rules of law the House must put such a construction upon the words as will support the testator's intention. It is therefore quite beside the question to argue what child should take; because the testator is describing the lives of persons in order to define the period of time during which the power of alienation is to be suspended, and the accumulation is to go on. But if it were necessary, I should have no difficulty as a lawyer in stating to the House, that I think the rule of law has been rightly laid down, that the period of gestation is to be taken at the beginning and the end. In *Gulliver* v. *Wickett* the devise was to a child of whom the mother

(a) Mr. Justice *Buller*. See 4 *Ves. jun.* 321.

was

was *ensient*, with a proviso that the property should go over if that child should die under 21 without issue; and in the construction of that devise it was laid down, that the devise extended to the child *in ventre sa mere* of the child to whom the property was devised; and that if the child to whom it was given had attained 20 years of age, and married and died leaving his wife *ensient*, it could not be said that the property was not vested. In the case of *Long* v. *Blackall* I thought it my duty as counsel to submit to the consideration of the Chancellor such points as occurred to me in support of the interest of my client, and urged that the allowance for the time of gestation was made at both ends. I thought that the point was not treated with the respect that it deserved. The Chancellor sent the case to the Court of King's Bench; but the point was not made; and when I pressed the Chancellor to send it there again, his answer upon that occasion was, that he was very much ashamed of ever having sent it there, and that he would not send it again. I know that Lord *Kenyon*'s opinion was quite clear upon the subject, as well as those of Mr. Justice *Buller* and Mr. Justice *Lawrence*. This therefore is a case in which the legal doctrine is clear, and equitable doctrine is clear. Whatever may be our regret upon the subject, is it not our duty to determine according to the rules of law and equity? When I put the question whether this judgment shall be reversed, I shall think myself bound to say that I think it ought to be affirmed,

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END OF TRINITY TERM.

AN

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2. On the *quarto die post* of the return of the ca. sa. against the principal, the bail are fixed; and if, after that time, they apply to stay proceedings against themselves pending a writ of error, the Court will not grant the application unless they undertake to pay not only the condemnation money, but also the costs of the action against themselves, the costs of the application, and, where there is no bail in error, the costs of the proceedings in error. *Copus* v. *Blyton*, *T.* 44 *Geo.* 3. 67

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1. Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10*s.* *per* load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of *A.* *B.* By indorsement made on the lease before execution it was agreed that it should be lawful for the lessor to let any part of the within-demised premises for the purpose of making bricks or tiles he paying the lessee 3*l* for every acre which he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel any part of the within-demised premises, he covenanting to pay to the lessor 20*l.* for every acre he should break up and dig at or before the expiration of the time, and to make good the same. Held that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease without making them good. *Flint* v. *Brandon*, *T.* 44 *Geo.* 3. *Page* 73

2. If tenant in tail male demise for a term of 99 years, and his lessee assign over to another, but, before such assignment, tenant in tail male dies, without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. *Andrew* v. *Pearse*, *H.* 45 *Geo.* 3. 158

3. A copyholder demised his copyhold to *J.* *S.*, to hold for one year, and at the end thereof, from year to year, for 13 years more, in all 14 years, if the lord would grant licence, but so as not to create a forfeiture, and covenanted that the lessee should quietly enjoy during the term aforesaid; and the lease contained many covenants and provisoes applicable only to a lease for several years. After the expiration of the first year, the copyhold was purchased by the lord, and surrendered to a trustee for him; who immediately gave a regular notice to quit to *J.* *S.*, no licence to let having been obtained. Held that, upon the expiration of the notice, the trustee might maintain an ejectment; and that no action would lie on the covenant for quiet enjoyment. Though the contents of the lease were known to the lord

lord before he completed his purchase, and though the covenant of the vendor against incumbrances contained an exception of the subsisting leases under which the tenants then held. *Luffkin* v. *Nunn*, *H.* 45 *Geo.* 3.
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1. Devise to the use and behoof of the testator's niece, *S. C.*, and his two nieces *E. G.* and *A. C.*, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint tenants. Held that under this devise *S. C.*, *E. G.*, and *A. C.* took as tenants in common. *Garland* v *Thomas*, *T.* 44 *Geo.* 3. 82
2. *A.* by will gave to his wife an annuity of 200*l.* for her life, in addition to her jointure, (which was secured upon an estate in the *West Indies*,) and 6000*l.* to his two younger children, to be paid at 21, and appointed *B.*, *C.*, and *D.* as trustees of inheritance for the execution thereof. Held that no interest passed to *B.*, *C.*, and *D.* in the testator's real estates. *Trent* v. *Hanning*, *M.* 45 *Geo.* 3. 116

3. Testator devised to *A.* for life, and after her death to *B.* for life, and at the decease of *A.* and *B.*, or the survivor, gave all his real estate to *C.* if he should live to attain 21; but in case he should die before that age, and *D.* should survive him, in that case to *D.*, if he should live to attain 21, but not otherwise; but in case both *C.* and *D.* should die before either of them should attain 21, then to *E.* in fee. Held that *C.* took a vested remainder. *Bromfield* v. *Crowder*, *T.* 45 *Geo.* 3. *Page* 313

4. The devisor, after using these introductory words, "as touching such worldly and personal estates wherewith it has pleased God to bless me, I give and dispose of the same in the following manner," gave an estate for life to his wife in all his freehold, leasehold, and copyhold, and, after her death, gave "all his lands, houses, *&c.* in manner following;" to *A.*, one of his grandsons, he gave "all his lands, freehold, copyhold, and leasehold in *E.*," and proceeded "also I devise all my estate, freehold and copyhold, in *H.*" to him; to *B*, another grandson, he gave all his estate, lands, *&c.* called or known, *&c.*, with 500*l.*; and to *C.*, his remaining grandson and his heir at law "the house I now live in, with all the lands, *&c.* belonging to the same, and also my houses and lands commonly called or known, *&c.*, and also 500*l.*" Held that *A.* took only an estate for life in remainder in the devisor's estate in *E.* *Doe* d. *Wright* v. *Child*, *T.* 45 *Geo.* 3. 335

5. Devise of real and personal estate to trustees, their heirs, executors, and administrators, in trust to lay out the personalty in land, and during the lives of the testator's sons *A. B.*, and *C.*, and of his grandson *D.*, the son of *A.*, and of such other sons as *A.* then had or might have, and of such issue as *D.* might have, and of such issue as any other sons of *A.* might have, and of such sons as *B.*, *C.*, and *D.* might have, and of such issue as such sons might have, as should be living at the time of the testator's decease, or born in due time afterwards, and during the lives and life of the survivors or survivor, to receive the rents and profits of the real estate devised and to be purchased, and lay out the same, from time to time, as they should arise, in land; and after the death of the survivor of such persons, to divide the whole into three lots, and to convey one to the eldest male lineal descendant of each of his three sons in tail male, with remainders to the second and third, and every elder male lineal descendant, with cross remainders in tail male; remainder to the trustees in fee, upon trust to sell and pay the produce to the king, to be applied to the use of the sinking fund, as should be directed by parliament. This is a good devise at law, and equity will enforce the trusts. *Thellusson* v. *Woodford*, *T.* 45 *Geo.* 3. *Page* 357

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1. A copyholder demised his copyhold to *J. S.* to hold for one year, and at the end thereof from year to year, for 13 years more, in all 14 years, if the lord would grant licence, but so as not to create a forfeiture; and covenanted that the lessee should quietly enjoy during the term aforesaid; and the lease contained many covenants and provisoes applicable only to a lease for several years. After the expiration of the first year the copyhold was purchased by the lord, and surrendered to a trustee for him, who immediately gave a regular notice to quit to *J. S.*, no licence to let having been obtained. Held that, upon the expiration of the notice, the trustee might maintain an actiion of ejectment, though the contents of the lease were known to the lord before he completed his purchase, and though the covenant of the vendor against incumbrances contained an exception of the subsisting leases under which the tenants then held. *Luffkin* v. *Nunn, H.* 45. *Geo.* 3. *Page* 163

2. Service of a declaration in ejectment, by nailing it on the barn-door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house, and the tenant not being to be found at his last place of abode, was allowed to be good service. *Fenn* v. *Roe, T.* 45 *Geo.* 3. 293

3. The Court held service of the declaration in ejectment on the wife of the tenant in possession sufficient, provided it could be shewn that the wife lived with her husband. *Jenny* d. *Preston* v. *Cutts, T.* 45 *Geo.* 3. *Page* 308

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1. Exchequer-bills purchased by the Bank for a good consideration, but signed in the name of the auditor of the exchequer by a person not legally authorised, are securities, or at least effects, within the meaning of the 15 *Geo.* 2. *c.* 13. *s.* 12. and if a servant of the Bank embezzle such bills he may be convicted of felony under that statute. *Rex* v. *Aslett, E.* 44 *Geo.* 3. 1

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1. Upon an indictment for disposing of and putting away a forged bank note knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *Rex* v. *Wylie, T.* 44. *Geo.* 3. 92

2. In

2. In an action on the statute for usury in discounting a bill, it was proved that one *B.* demanded payment of the acceptor, and commenced an action against him, and afterwards received the amount of the bill and the costs of those proceedings on producing the bill, and gave a receipt as attorney of the present Defendant; this without further evidence of *B.* being the agent of the Defendant, and without the production of the proceedings against the acceptor, was held good *primâ facie* evidence to be left to a jury of the Defendant having received the usurious interest. *Owen* v. *Barrow*, *M.* 45 *Geo.* 3. *Page* 101.

3. Action for these words spoken by Defendant of the Plaintiff in his profession of a physician: "Dr. *S.* has upset all we have done, and die he (the patient) must." It was proved that the Plaintiff had practised several years as a physician, and having been called in during the absence of a physician, who, with the Defendant, attended the patient; the Defendant, as apothecary, made up the medicines prescribed by the Plaintiff for the patient in question, *Quære*, Whether, on this declaration, it was necessary for the Plaintiff to produce a diploma, or other direct evidence, that he had taken a degree in physic, in order to maintain the action, the Court being equally divided. *Smith* v. *Taylor*, *H.* 45 *Geo.* 3. 196

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1. The Court will discharge a feme covert Defendant upon a common appearance, though she contracted the debt as a feme sole, and was entrusted by the Plaintiff as such, unless she represented herself to be single. *Collins* v. *Rowed*, *T.* 44. *Geo.* 3. 54

2. To a plea of coverture the Plaintiff replied, that the Defendant's husband "lived and resided in parts beyond the seas, *viz.* in *Ireland*; and that the Defendant lived in this kingdom separate and apart from her husband as a single woman; and as such single woman

woman promised," &c. Held bad upon a general demurrer. *Farrar* v. Lady *Granard*, *T.* 44 *Geo.* 3. *Page* 80

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1. Where the estate of a married woman has been regularly sold, with the consent of her husband, the conveyance executed by him, and the purchase-money paid, the Court of *C. B.* will not prevent the wife from levying a fine because her husband has since become *non compos*, *Stead* v. *Izard*, *T.* 45 *Geo.* 3. 312

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1. *A.* being insolvent, a verbal agreement was entered into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10*s.* in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to *B.* Held that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. *Anstey* v. *Marden*, *M.* 45 *Geo.* 3. *Page* 124

2. A note or memorandum, in writing of a contract for the sale of goods signed by the seller only, is not a sufficient memorandnm within the meaning of the statute of frauds. *Champion* v. *Plummer*, *E.* 45 *Geo.* 3. 252

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1. If goods be sold at two months credit, to be paid for by a bill at 12 months, and the goods be not paid for after the expiration of the 14 months, the vendor may recover in an action for goods sold and delivered. *Brooke* v. *White*, *T.* 45 *Geo.* 3. 330

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1. Action on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th of *December* without communicating a letter received by them the day before, but dated the 30th *November*, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible; held a material concealment, though the ship did not in fact set sail till the 24th of *December*. *Willis* v. *Glover*, *E.* 44 *Geo.* 3. *Page* 14

2. Action on a policy on goods "until the cargo should be discharged and safely landed;" on the arrival of the ship the goods insured were put on board a lighter, hired in the usual way, and brought to the Plaintiff's wharf in the evening, but not landed on account of the rough weather; the Plaintiff then undertook to see the landing himself, but, n the night, the lighter, by an unavoidable accident, was sunk, and the goods were lost: held that the underwriters were discharged. *Strong* v. *Natally*, *E* 44 *Geo.* 3. *Page* 16

3. Policy on freight valued at 500*l.* on a voyage at and from *Demerara*, *Berbice*, and the *Windward* and *Leeward Islands* to *London*. The ship being at *Demerara*, an agreement was entered into by the master with a house there for a freight from *Berbice* to *London*, the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demerara* to *Berbice*, and deliver them there; while proceeding from *Demerara* to *Berbice*, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight. Held that it was not a loss within the policy. *Seller* v. *M'Vicar*, *E.* 44 *Geo.* 3. 23

4. In effecting a policy on the 8th of *January*, at *Whitehaven*, on a ship "at and from *Barbadoes* to *Liverpool*," a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer; was expected to have sailed on the 28th *November*; and that the *Barton*, a coppered vessel, and very fleet, which had sailed the 24th from *Barbadoes*, had arrived on the 5th *January*, but no notice was taken of the *Agreeable*, another coppered and fleet vessel, which sailed the 29th *November*, having also arrived on the same day as the *Barton*. After verdict for the Plaintiff, the Court refused to grant a new trial on the

the ground of concealment. *Littledale* v. *Dixon*, *H.* 45 *Geo.* 3.

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5. Policy on goods on board a particular ship from *A.* to *B.*, "against sea-risk and fire only;" in the course of the voyage from *A.* to *B.* the ship was carried out of the course of the voyage by a king's ship, but being afterwards released, she proceeded on the voyage insured, and, while so proceeding, the goods insured sustained sea-damage. Held that the underwriters were liable for this loss. *Scott* v. *Thompson*, *H.* 45 *Geo.* 3.

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6. Policy upon the freight of the ship *Stranger*, at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and discharge and take goods on board there. The Plaintiffs had agreed by charter-party that the ship should take in goods at *London* and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as their agent should direct, and receive on board wine, and proceed to *Jamaica*, and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*; such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place, by *Madeira* wine, at 40*l.* *per* pipe, to be carried in the said ship to *Jamaica* free of freight; the ship arrived at *Madeira*, and delivered all her *London* cargo, except 33 casks of coals, which the captain kept on board to stiffen the ship; having received part of his cargo for *Jamaica*, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables, and run out to sea, where he was captured. Held that the Plaintiff was entitled to recover for a total loss. *Atty* v. *Lindo*, *E.* 45 *Geo.* 3.

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ISSUE.

See AMENDMENT 1.

1. If to a rejoinder concluding with a verification, the Plaintiff add the *similiter*, and take the record down to trial, and the Defendant obtain a verdict, the Court will not grant a new trial, but will amend the record. *Grundy* v. *Mell*, *E.* 44 *Geo.* 3. 28

JUDGMENT.

See ARREST 2.

JURY.

See VERDICT 1.

L.

LANDLORD AND TENANT.

See PLEADING 7.

LEASE.

See EJECTMENT 1. COVENANT 2.

LIBEL.

See DEFAMATION 1.

LICENCE.

See EJECTMENT 1. COVENANT 2.

LIEN.

LIEN.

See COSTS 1. STOPPAGE IN TRANSITU.

LIGHTER-MAN.

See INSURANCE 2.

LIMITATIONS, STATUTE OF.

1. Under a plea of the statute of limitations the plaintiff gave in evidence a letter of the Defendant's, in answer to an application for payment of his debt, in which the latter referred the Plaintiff to his solicitors, by whose opinion he should be governed, adding "they are in possession of my determination and ability;" and also a conversation with the Defendant's solicitors, in which they stated that if the Plaintiff had and letter which would bind the Defendant, the debt would be paid if it amounted to 100*l.*; this being left to the jury, a verdict was found for the Plaintiff; but the Court, inclining to think it did not take the case out of the statute, granted a new trial. *Bicknell* v. *Keppell*, *E.* 44 *Geo.* 3.

Page 20.

LORDS' ACT.

1. Payment of the weekly allowance to a prisoner under the lords' act, to the person who opens the door of the prison, is a sufficient payment to the prisoner within the meaning of the act. *Parsons* v. *Solomon*, *M.* 45 *Geo.* 3.

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2. If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation-seal, it is a sufficient compliance with the words of the lords' act, which require it to be signed with the name or mark of the Plaintiff. *Doe* v. *Hogg*, *T.* 45 *Geo.* 3.

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M.

MANOR.

See EJECTMENT 1. COVENANT 2.

MEMORIAL.

See ANNUITY.

MONEY HAD AND RECEIVED.

1. *A.* having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let *B.* use it upon payment of a certain annual sum, secured by bond; this sum was paid for several years, when *B.* discovering that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid. Held that he could not recover. *Taylor* v. *Hare*, *E.* 45. *Geo.* 3.

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2. The Plaintiff having declared upon an agreement to deliver soil or breeze with a count for money had and received,, proved that the Defendant having agreed to deliver soil, he the Plaintiff paid 2*l.* 5*s.* for earnest, but that the Defendant refused to deliver the soil. Held that he could not recover damages for the non-delivery on the first count, on account of the variance;

variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force. *Cooke* v. *Munstone*, *T.* 45 *Geo* 3 *Page* 351

N.

NONSUIT.

See ACTION PERSONAL.

O.

OBLIGATION.

See CONDITION 1.

P.

PATENT.

See MONEY HAD AND RECEIVED 1.

PERSONAL ACTION.

See ACTION PERSONAL 1.

PLEADING.

See DETINUE 1, 2. FEME COVERT 2. MONEY HAD AND RECEIVED 2. VARIANCE 1.

1. The first count of a declaration being in trover for bills of exchange, and the second and third counts stating the delivery of the bills to the Defendant, in order that he might get them discounted for a certain commission, and his having got them discounted, and his converting and disposing of the money to his own use; the Defendant demurred generally; on the ground of a misjoinder of tort and contract, the subject of the two last counts being matter of contract; but the Court held that, on a general demurrer, as all the counts were in the form of tort, judgment must be for the Plaintiff if any one count was good. *Judin* v. *Samuel*, *E.* 44 *Geo.* 3. *Page* 43

2. In an action for words alleged to have been spoken of one as a candidate to serve in parliament, it is not necessary to set out the writ, in order to shew that the plaintiff was a candidate. *Harwood* v. *Astley*, *T.* 44 *Geo.* 3. 47

3. The 11 *Geo.* 2. *c.* 19. respecting avowries in replevin, does not extend to any avowry for a rent-charge. *Bulpit* v. *Clarke*, *T.* 44 *Geo.* 3. 56

4. The defendant in replevin having made cognizance for rent-service, as bailiff of *A.*, *B.*, and *C.*, who were lawfully possessed of a certain manor, of which the *locus in quo* was parcel, and holden at a certain rent; the Plaintiff replied that *A.*, *B.*, and *C.* were not seized in their demesne as of fee of the manor. Held bad on demurrer. *ib.*

5. If a contract of freight and demurrage be entered into by deed, the Plaintiff cannot declare in debt generally, and give the deed in evidence, but ought to declare upon the deed. *Atty* v. *Parish*, *M.* 45 *Geo.* 3. 104

6. Declaration stated that Plaintiff, at the request of *E. B.* and *M. B.*, sold and

and delivered to them goods of a certain value; and that, in consideration thereof, and also in consideration that the Plaintiff, at the request of the Defendant, would forbear and give day of payment of the said sum of money, Defendant, by a certain note or memorandum in writing, signed by him, undertook to pay him the money, and then alleged that Plaintiff, relying on the promise of Defendant, did forbear and give day of payment of the said sum, &c. After verdict for Plaintiff the Court refused to arrest the judgment on the ground of the declaration not stating to whom the forbearance was given. *Marshall* v. *Birkenshaw*, *H.* 45 *Geo.* 3.

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7. In debt for double the yearly value, under 4 *Geo.* 2. *c.* 28., the Plaintiff, after stating a demise to the Defendant's wife, and her subsequent intermarriage with the Defendant, alleged, in the first count, a notice to quit and demand of possession delivered to the Defendant and his wife; and, in the second court, alleged a notice to quit and demand of possession delivered to the wife previous to her intermarriage with the Defendant. Held that, to support the second count, the wife need not be joined for conformity; and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the intermarriage. *Lake* v. *Smith*, *H.* 45 *Geo.* 3. 174

8. Proctors cannot be sued together as for one offence in not having obtained and entered their certificate. *Barnard* v *Gostling*, *E.* 45 *Geo.* 3. 245

9. *Quære*, Whether it be not bad to sue under the statute for not having obtained and entered a certificate, without distinguishing which of those two omissions the person sued has been guilty of? *Page* 245

10. In an action against 46 Defendants, where the declaration contained two counts for work done by Plaintiff as an attorney, and two more for work done by him, without saying in what capacity, the Court ordered two counts, to be struck out, and the word "Defendants" to be substituted for the names of the Defendants in all the places where they occurred, except the first. *Meeke* v. *Oxlade*, *T.* 45 *Geo.* 3. 289

PLEDGES.

See REPLEVIN 1.

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL. ARREST 1, 2, 3. BAIL. COSTS 1. EJECTMENT 2, 3. FEME COVERT 1. PLEADING 8. REPLEVIN 1. VENUE 1, 2. VERDICT 1.

1. Where a judgment against the principal is set aside upon condition that the bail bond should stand as a security, the bail, if sued upon the bail-bond, are entitled to a rule to plead, and a demand of a plea, before judgment can be signed against them. *Evans* v. *Surman*, *T.* 44 *Geo.* 3. 63.

2. If the affidavit, upon which a motion for an attachment is founded, merely state that the officer of the sheriff was served with a copy of the rule to bring in the body, but does not add that the original rule was shewn to him, the

the Court will set aside the attachment. *Barnard* v. *Berger*, *M* 45 *Geo.* 3. *Page* 121

3. The Court will not open the rule for an attachment on the mere affidavit of the party, that he has not been served; at least, unless he shew some mistake in the service. *Hopley* v. *Granger*, *E.* 45 *Geo.* 3 256

4. When time to plead has been obtained, if the Defendant plead, and give a rule to reply, before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea. *Gandy* v. *Borrowdale*, *E.* 45 *Geo.* 3. 273

5. Where the Defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the Court refused to set aside a judgment for want of service of the notice at the Defendant's last place of abode. *Losemore* v. *Cohen*, *E* 45 *Geo* 3. 279

6. The Court will not allow the Plaintiff to take out execution pending a writ of error, merely because the Defendant's attorney has declared that the debt would be settled, and that time was all the Defendant wanted. *Rawlins* v. *Perry*. *T.* 45 *Geo.* 3. 307

7. If a Defendant accept a declaration and act as if an appearance has been entered for him, the Court will not afterwards permit him to set aside a judgment for want of an appearance having been entered. *Williams* v. *Strahan*, *T.* 45 *Geo.* 3. 309

PRISONER.

See LORD'S ACT 1, 2.

PROCEEDINGS, STAYING AND SETTING ASIDE,

See PRACTICE 5. 7.

PROCESS.

See PRACTICE 3.

PROCTOR.

See COMMON INFORMER 1. PLEADING 8, 9.

PROMISSORY NOTES.

See AFFIDAVIT TO HOLD TO BAIL 1. STAMPS 1.

PURCHASER.

See TITLE 1.

R.

RELEASE.

1. *A.*, the mother of *B.*, having entered into a bond on his behalf for 1000*l.*, *B.* executed an indemnity bond of the same date, *viz.* 26th *April* 1800, in the sum of 2000*l.*, conditioned for the payment of 1000*l.* three months after her decease; on the 9th *February* 1801, *A.* made a codicil to her will, by which she relinquished two debts due from him, one of 1000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1000*l.* bond of the 26th *April*; three days after the execution of this codicil, *A* executed a release to *B.*, in which, after mentioning a sum of 500*l.*, for which she had his bond, and two sums of 480*l.*

and 300*l.* due to her from *B.*, for which she had receipts, expressed that she had agreed to release *B.* from those sums, "and of and from all and any other sum or sums of money, claims, and demands thereby secured, or intended to be secured, and all other sum or sums of money, claim and demand whatsoever," and released him accordingly from those sums, and all claim on account of those sums, "or for or on account of any other matter, cause, or thing whatsoever." Held, 1st. that this release did not extend to the indemnity bond. *Butcher* v. *Butcher*, *M.* 45 *Geo.* 3. *Page* 113

2. And, 2dly, that no extrinsic evidence could be admitted to explain the intentions of *A.* as to the release *ib.*

RENDER.

See BAIL 4.

RENT CHARGE.

See PLEADING 3, 4.

REPLEVIN.

See PLEADING 3, 4.

1. If insufficient pledges *de retorno habendo* be taken by the officer of the Court below in replevin, the remedy against him is by action, and this Court will not order him to pay the costs recovered by the Defendant in replevin. *Tesseyman* v. *Gildart*, *T.* 45 *Geo.* 3. 292

RIGHT, WRIT OF.

1. The Court refused to allow the Demandant in a writ of right to amend the mistake of a christian name in the count, though an affidavit accounting for the mistake was produced. *Charlwood* v. *Morgan*, *T.* 44 *Geo.* 3. *Page* 64

2. Or to discontinue the suit. *ib.*

3. The Court refused to permit the Defendant in a writ of right to amend his count, by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the Demandant having been misinformed in the country, and that the Demandant would be barred unless the amendment were allowed. *Baylis* v. *Manning*, *E.* 45 *Geo.* 3. 233

S.

SALE.

See GOODS SOLD AND DELIVERED 1. STOPPAGE IN TRANSITU 1. TITLE 1.

SEAMEN's WAGES.

1. Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money, as the wages due to a deceased seaman, and paid the same to *Greenwich Hospital*, under the 37 *Geo.* 3. *c.* 73., the representative of such seaman may still sue the captain for any wages due beyond the sum so paid. *Armstrong* v. *Smith*, *T.* 45 *Geo.* 3. 299

2. If a sailor execute the articles prescribed by 37 *Geo.* 3. *c.* 73., and serve accordingly, and during the voyage, part

part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages. *Thompson* v. *Collins*, T. 45 *Geo.* 3.
Page 347

3. *Semb.* That in such case he is not even liable to a proportionable deduction from his wages in common with the other sailors, on account of such plunderage. *ib.*

SERVICE.

See PRACTICE 3.

SET-OFF.

See COSTS 1. 4,

SHERIFF.

See BAIL 6.

SHIPS.

See SEAMAN'S WAGES.

SIMILITER.

See AMENDMENT 1.

SLANDER.

See DEFAMATION 1.

STAMPS.

See EVIDENCE 4.

1. A promissory note drawn before the 37 *Geo.* 3. *c.* 136. upon a receipt stamp of equal value with that required for a promissory note, is not available in law. *Chamberlain* v. *Porter*, E. 44 *Geo.* 3. 30

2. The assignment of a lease in writing without seal, did not require a stamp before the 44 *Geo.* 3. *c.* 98. *Hodges* v. *Drakeford*, E. 45 *Geo.* 3. 270

3. If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matters, such bond requires only one stamp. *Bowen* v. *Ashley*. E. 45 *Geo.* 3.
Page 274

4. A defeazance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney. *Cawthorne* v. *Holben*, E. 45 *Geo.* 3. 279

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED OR COMMENTED UPON.

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5. *c.* 21. *s.* 3. (Stamps.) 276

WILL. 3.

9 & 10. *c.* 25. *s.* 37. (Stamps.) *ib.*

ANNE.

12 Stat. 2. *c.* 9. *s.* 21. (Stamps.) *ib.*

GEO. 1.

9. *c.* 22. (Black Act.) 6

GEO. 2.

2. *c.* 25. (Larceny.) 3
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GEO. 3.

13. *c.* 51. *s.* 1. (Wales.) 267
16. *c.* 30. (Deer.) 6
34. *s.* 1. (Stamps.) 276
17. *c.* 26. (Annuity.) 214
19. *c.* 50. *s.* 16. (Stamps.) 276
22. *c.* 33. (Stamps.) 31
23. *c.* 49. (Stamps.) *ib.*
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27. *c.* 13. *s.* 41. (Stamps.) 31
31. *c.* 25. (Stamps.) *ib.*
35. *c.* 55. (Stamps.) 32
37. *c.* 73. Seaman's wages.) 299
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123. (Unlawful oaths.) 5
136. (Stamps.) 38
39. *c.* 85. (Embezzlement.) 5
39 & 40. *c.* 104. (Court of Requests.) 153

STOPPAGE IN TRANSITU.

1. A number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendor, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt: whereupon the vendor, within 10 days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade, the charges of warehousing were to be paid by the vendor for 14 days after the sale. Held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger. *Hammond* v. *Anderson*, T. 44 *Geo.* 3. *Page* 69

T.

TAXATION.

See COSTS 3.

TAXES.

1. If a constablewick consist of several hamlets, and two collectors of the duties on houses, &c. are appointed for each hamlet, and the collector or collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors have failed is liable to a re-assessment under 20 *Geo.* 2. *c.* 3. and not the whole constablewick. *Barrs* v. *Digby*, E. 45 *Geo.* 3. 281

TITLE.

1. The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser was ignorant, *Doe* d. *Bothell* v. *Martyr*, T. 45 *Geo.* 3. 332

TREES.

1. Certain lands, together with the woods, &c., were conveyed under a marriage settlement to *A.* and *B.*, their heirs and assigns, during the life of *S. W.*, in trust, to pay the rents

rents and profits as the said *S. W.* should appoint during her life, and after her decease, to the use of such child or children of the marriage, and in such shares, as the said *S. W.* should appoint; and, for want of appointment, to the use of the children equally, *&c.* and the heirs of their bodies, with cross remainders: and, in default of such issue, to the use of the right heirs of *S. W.* for ever. Held that *A.* and *B.* could not maintain trover against the Defendant, a stranger, for certain trees, which had been cut down by order of the husband of *S. W.*, and carried away by the Defendant. *Blaker* and another v. *Anscombe, E.* 44 *Geo.* 3. *Page* 25

TROVER.

See TREES 1.

U.

USURY.

See EVIDENCE 2. PLEADING 6.

UTTERING.

See EVIDENCE 1. FORGERY 1.

V.

VARIANCE.

1. The Plaintiff having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the Defendant having agreed to deliver soil, he the Plaintiff paid 2*l.* 5*s.* for earnest, but that the Defendant refused to deliver the soil. Held that he could not recover damages for the non-delivery on the first count, on account of the variance. *Cooke* v. *Munstone, T.* 45 *Geo.* 3. *Page* 351

VENDOR AND VENDEE.

See GOODS SOLD AND DELIVERED 1. STOPPAGE IN TRANSITU 1. TITLE 1.

VENUE.

1. The Court will not discharge a rule for changing the venue from *A.* to *B.* upon an affidavit, shewing that the cause of action arose partly in *A.* and partly in *B.*, and that all the witnesses reside in *A.* But the Plaintiff must undertake to give material evidence in *A.* *Henshaw* v. *Rutley, M.* 45 *Geo.* 3. 110

2. It is no answer to an application to change the venue from *London* to *Essex* on the usual affidavit, in an action commenced by assignees, that the commission was issued, and the bankruptcy declared, in *Middlesex*, and the assignees chosen in *London*. But in such case the Plaintiffs can only retain their venue by undertaking to give material evidence where it is laid. *Clarke* v. *Reed, T.* 45 *Geo.* 3. 310

VERDICT.

1. The Court will not set aside a verdict upon the affidavit of a juryman that

that it was decided by lot. *Owen* v. *Warburton*, T. 45 Geo. 3. *Page* 326

W.

WAGES.

See SEAMAN'S WAGES 1.

WALES.

See ACTION PERSONAL 18

WARRANT OF ATTORNEY.

See STAMPS 4.

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See EVIDENCE 4.

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See DEFAMATION 1. EVIDENCE 3.

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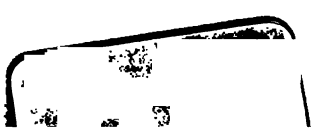
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